

HARVARD LAW SCHOOL

**THE INVISIBLE AND UNTOUCHABLE
CHILDREN ON THE STREETS OF RIO: AN
ANALYSIS OF THE PROBLEM**

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THE INVISIBLE AND UNTOUCHABLE CHILDREN ON THE STREETS OF RIO: AN ANALYSIS OF THE PROBLEM

I - Introduction.

"The widespread media of young Brazilians protesting in the streets of Rio de Janeiro symbolize street children to many people in Europe. Street children are understood to be children without any shelter. However, it is clear that in Europe such street children are the exception.

The concept of street children needs to be much broader"

(Coordinated Research program in the social field, Study group on street children. Council of Europe press, 1994)

The existence of street children in Brazil is the problem to be scrutinized during the present essay. Who are street children, anyway, one could ask. Should such a category be reaffirmed? And, still, why? I intend to answer these and other questions, opportunely. For now though, it can be affirmed that a great number of children are born and grow up on most of the Brazilian urban centers. The evolution of this problem has been described and analyzed fundamentally from the 80's when it gained irrefutable expression in Brazil. Rio de Janeiro city, as displayed in the passage above seems to have become famous worldwide by producing generations of street children. Death squads that kill street children, police harassment and prostitution are some examples of the violence they suffer while in the streets which have been exposed by the media.

Limiting the factual basis of this paper in the context of Rio de Janeiro, seemed to be the most appropriate option for me. The reason is that I have lived all my life in this city and that I worked on the human rights field, during the last five years as a lawyer in the non-governmental sector dedicated to children's rights or, more specifically, to at-risk children (*crianças em situação de risco*) which is a common expression used

among those who are involved in children's rights advocacy all over the country and in Rio

de Janeiro city.

Even though it can be affirmed that the existence of children living on the streets is not recent and that, for example, it originated with the emancipation of slaves in Brazil, on 1888, the problem of street children in the urban centers of the country will be analyzed only from its major expansion, during the 80's and throughout the 90's. As mentioned above, this essay considers the problem in Rio de Janeiro City.

The presence of a growing number of children in the streets was the subject-matter of several investigations during the early 80's, as I will refer to. The rapid increase in this number and all the factors that followed this phenomenon reshaped the problem into what is now termed street children. Its existence is now notorious internally and internationally and it has not only been extensively investigated, but has inspired various actions, by various parties, of different natures.

The reactions and measures taken towards solving the problem will be analyzed, considering State and Society, from both a domestic and international standpoint. This analysis will be based on the available bibliography over the theme, on statistics, on Brazilian legislation and on the international human rights law.

It is a broad topic although the evaluation of the impact of the legislation, on the protection of fundamental rights will be central. After many years of martial rule, Brazil entered into an era of constitutional democracy, since a new Constitution was enacted in 1988. The advance of legislation for the protection of children was also advanced under the new constitutional spirit.

The rights discourse was given expression and has been the basis for many
Endeavors towards the children well-being. To what extent the new legislation reaches
street children will be taken into consideration that is how effective has been the rights
discourse and action? Again, my own experience, as one that relied on the effectiveness
of
the enforcement of rights will enlighten my analysis.

II. Political, Social and Economical aspects: the 80's and 90's in Brazil - an overview.

1. Introduction

The 80's were extremely critical and chaotic years in Brazil, due to political instability (military regime that began gradually the transition to democracy), economic recession and social exclusionary expansion. It is popularly known as the lost decade.

Whereas democracy has been reestablished during the 90's, based on the exercise of political and civil rights, such as universal elections and free political association, economic arrangements were not still sufficient to reduce social exclusion. The growing number of children and families living in the streets is one of the outcomes of this overall political, social and economic context in Brazil.

2.The Context

The following statistics elucidate the balance between social and economic development in Brazil from the 80's throughout the nineties. It is one among other important aspects that are relevant for the analysis of the problem of the existence of street children.

The national GNP rate demonstrate the dimension of the economic recession and crisis that was beginning in the 80's. Before the crisis, Brazil had the 8th higher GNP of

the world. After the 80's, Brazil moved to 11th position.¹ The table below describes the presents the evolvement of the GNP rates during the 80's and in the beginning of the 90's in Brazil.²

1980	1981	1982	1983	1990	1992
9,2%	-4,4%	0,7%	3,4%	-4%	-1%

The GNP *per capita* average annual growth rate are:³

1965-1980	1980-1993	1985-1995
6,3%	0,3%	-0,8%

Brazil still presents among the highest rates of inflation from among 150 countries reported by UNICEF. The country's rate of inflation during 1980-1993 was 423% .

The population has also been growing fast, which doesn't constitute a problem in itself. But the combination of all the factors and specifically, the demographic increment from the 80's on brought unexpected adverse effects due to the existing political and economic context. The approximate estimations over the population growth in Brazil are:⁴

1872	1940	1970	1980	1990
9,9 million	41 million	93 million	119 million	146 million

In 1996, 60.228 millions were under 18 years-old and 15.626 millions were under 5 years-old.⁵

The level of poverty at the rural areas is also an important element to understand

¹ Dimenstein, Gilberto. "O Cidadão de Papel – A Infância, a Adolescência e os Direitos Humanos no Brasil (*The Straw man – the childhood, the adolescence and Human Rights in Brazil*)". Editora Atica. São Paulo, Brasil. 1993, at 63.

² IBGE – Instituto Brasileiro de Geografia e Estatística (Brazil's Institute of Geography and Statistics). Informações Estatísticas e Geocientíficas, Pesquisa Nacional por Amostra de Domicílios – PNAD (National Survey by domiciles) 1996.

³ UNICEF. "The State of the World's Children 1998". Statistical Tables. Economical Indicators.

⁴ Dimenstein, Gilberto, *supra* note 1, at 89.

⁵ UNICEF, The State of the World's Children, *supra* note 3.

Brazilian reality. It provokes the *exodus* from the rural to the urban areas. From 1980-89, 34% of the rural population was below absolute poverty level population, while 9% of the urban population was on the same situation. In 1980, 50.6% of the population was living in the cities. In 1991, 47 millions of people were concentrated on only 8 cities of the whole country. The urban population in the Southeast is 59.691.778 million, which means more than 1/3 of the population concentrated on the cities of this region, where Rio de Janeiro is located. From that amount, 23.140.112 are under 18 years-old. Although there is a slight recent flux moving back to the rural areas documented by CPT⁶(Pastoral Commission for the Land) the total rural population in Brazil was about 31.850.15 people, in 1996, and there were 7.599.840 in the Southeast. In 1996, 79% of the population was urbanized.⁷ Combining that with low levels of income and education, a not very optimistic figure is shaped.

The cities are not prepared for the high rates of migration and for receiving these large number of new citizens. Through the years though, the migration doesn't seem to be part of the past. And the cities still can't provide adequate infrastructure for its population.

Unemployment and subemployment are common. In 1992, 8 million of unemployed and 23 million subemployed lived in the cities.⁸ Low wages, means, in a city translates into malnutrition and poor housing. Besides public schools and

⁶ Comissao Pastoral da Terra – CPT (Pastoral Land Commission). Annual Report 1995.

⁷ IBGE, “PNAD” supra note 2. Official data provided by IBGE estimates that there are 154.360.589 in 1996.

⁸ Dimenstein, Gilberto. “Cidadao de Papel” supra note 1 at 90.

Hospitals can't accommodate all the demand in the cities. And, even when a place in school exists, a children may have reasons discouraging her/his to attendance in the school. Taking care of smaller brothers and sisters, housekeeping and working are some reasons. Hunger is another reason. Most public schools provide food as a condition of attendance. A belief that going to school is not going to change their situation of misery is also one reason for school evasion. From 1991-1996, 7.8 millions of children and adolescents, from 5 to 17 years-old were working in Brazil. Still, from this number, 4.6 millions from 10-17 years-old work and study; 2.7 millions, still from 10-17 years-old only work and 522.000 from 5-9 year-old only work.⁹Recent data about the situation of street children in Rio de Janeiro is scarce. IBGE (1996) estimation on the rate of child labor is quite different since it doesn't reach under 10 years-old or the informal work market. Street children in general are not part of IBGE estimation. According to IBGE, there were around 2.800 million children from 10 to 14 years-old working in Brazil in 1990. Unfortunately, it the situation doesn't seem to have changed much lately. IBGE (1996) estimates 2.929.528 that there were children between 10 and 14 years-old working. According to the Federal Constitution and to the Statute of the Child and the Adolescent, no child under 14 years-old is allowed to work.¹⁰

In Rio city, there are 394 *favelas*, congregating 203.226 domiciles.¹¹ *Favelas* are shanty town located mostly on hills and mountains all over the city. The services of sanitation, water supply and regular electricity are scarce and the residents have no right to

⁹ UNICEF, *supra* note 3.

¹⁰ IBGE, "PNAD" 1996, *supra* note 2.

¹¹ IBGE, "PNAD" 1996, *supra* note 2.

property over the occupied land. Many residences are located at at-risk locations. The *favelas* located on the upper media class neighborhoods symbolizes the existing contracts found in Brazilian society, in terms of distribution of wealth. The rates for distribution of wealth, in 1990 were:¹²

1990	10% richer	80% poorer
	49,7% (of the national wealth)	33,9%

From that picture, still, 1% of the richest concentrates 14% of the wealth and 50% of the poorest owns 11.2% alone. In 1991, when the GNP *per capita* was US\$2.680,00 (and US\$3.640,00 in 1995), there were 64.5 millions people living below the line of poverty. Considering that 41.9%, of the population is young (0-18 year-old) the social segment most affected are the children. In the South East, the most developed region of the country, 38.5% of the children are considered on the situation of extreme poverty.

In the North east, this percentage varies, at times being as high as to 77.5% of the region's children.¹³ Further, 29% of the population was earning below US\$1 a day during 1990-1996.¹⁴

The unequal distribution of wealth among the population is one factor that contributes to the disparity between the social and economic developments. Among many different implications child mortality evidences the level of development of a country.

Brazil is the 79th country in terms of children under 5 mortality rank.¹⁵

Under - 5 Mortality Rate

¹² Dimenstein, Gilberto, "Cidadao de Papel" *supra* note 1 at 55.

¹³ Dimenstein, Gilberto, "Cidadao de Papel" *supra* note 1 at 52.

¹⁴ IBGE, "PNAD 1996", *Supra* note 2.

¹⁵ UNICEF, "The State of the World's Children 1998", *Supra* note 3.

1980	1994	1996
93	61	52

Dimenstein reports that despite the growing needs of the population, and the lack of state regulation over the major problems affecting the population and therefore, the country, as a whole, in 1989, the central government expenditures on the social development were even reduced. The central government expenditure during 1990-96 was:¹⁶

Health	Education	Defense
5%	3%	3%

The decision over the priorities of the central or local government is necessarily conditioned by the level of participation of the citizens on the decisions taken by the state powers. Analyzing the impact and inheritance of the military regime on the political culture that shapes the level of interest and participation on the country's political life, Bicudo states that " From the social point of view, the military governments were extremely oppressive, striking the civil institutions with the power of the arms , in a context that no one could distinguish the limits between the army actions and the police forces actions. In the economic area, they built a very centralized structure, imposing their decisions to the society. It would be supported by the Congress, which didn't represent the people, submitting its decisions to the system, representing the Council of National Security, the State superpower."¹⁷

¹⁶ UNICEF. The State of the World's Children 1997.

¹⁷ Bicudo, Helio. "Violencia. O Brasil cruel e sem maquiagem. (*Violence: cruel Brazil without make-up*)" Editora Moderna. Sao Paulo, Brasil.1994 at 46.

The military regime started in Brazil in 1964. In 1988, a new constitutional order was reestablished and in 1989, the President was chosen directly by the population when franchise was direct and universal. More than two decades of repression suffocated the culture of participation in the national political life through social organized movements, groups or even individually. Fear of engaging in political activities also could be felt at the beginning of the 90's. Rebuilding the political life in the country is, therefore fundamental for the participation in a full democratic regime.

Unfortunately, there is beyond State negligence and discrimination, resistance manifested by State authorities to the process of democratization. Illustrating this assertion

on September, 1997, Rio de Janeiro State Department of Public Security, Nilton de Albuquerque Cerqueira published a note in a local newspaper¹⁸ criticizing the interference

of the international NGO Human Rights Watch, that runs an office in Rio City, on national

issues. He also expresses his opposition to the existence of NGO's. The reason for this anger was that Human Rights Watch criticized the human rights conditions in the country.

Mr. Cerqueira served the military dictatorship and his attitude reflects the nature of the social policies that have been carried on by the Department he heads. Cerqueira brings back to the State apparatus the policy of social control, which is oppressive and authoritative, towards the underprivileged groups in society, such as street children. But, still, progress can be felt in the national political life, as well as in the economic and social

¹⁸ Opiniao dos Leitores, Alienigenas (Aliens), Jornal do Brasil (Brazil's Newspaper), September 7, 1997.

spheres. I intend to analyze the overall progress in contrast with the problem of street children.

III- Children on the Streets of Rio de Janeiro

1.Origins.

The presence of poor children on the streets of the urban areas in Brazil has been reported and analyzed through the years. Some of these analysis link the phenomenon of street children to the slavery emancipation.

Dimenstein, for instance, states that " our history is marked by the violence of the ones who attain power against the weaker. It starts with the massacre of the native population, that, until the discovery of Brazil, didn't know what was hunger and social inequality.(...)Brazil was the last independent nation to abolish slavery. It left deep marks in the national culture, in the way the people face and deal with the world. It is one of the ingredients for the understanding of how , still nowadays, so many murders are committed in the rural areas, which are in general left unpunished. Historically, the problem of street children appears as a direct consequence of slavery. In 1906, the police chief of the Federal District (Rio de Janeiro) would manifest his annoyance: *There are in this capital, disseminated everywhere, numerous minors of the masculine sex, that, with no support and protection, with no resources, and so that provides them subsistence, adhere to the practice of delicts and addictions.* These boys

were sons of slaves. Due to the lack of education and qualification, they faced difficulties to find a place in the work market. Primary school was even more limited than today."¹⁹

Despite its remote origin in Brazilian historical formation, the problem of street children, as will be described and, according to a specific profile that will be next identified, seems to have been produced from the 80's on. Tracing the origins of the problem of the existence and consolidation of this special segment of the population in Brazil, specifically in Rio de Janeiro, demands the consideration of its various causes.

The reasons why it has been occurring and consolidating seem to be very well explored by Minayo²⁰. Locating the consolidation of the problem, she analyses how the depression/recession in Brazilian economy affected the working class during the 80's and hence, the families, from where the children come. She says that " this problem (of street children) has social-historical roots in the social Brazilian formation and is the result

of a process of urbanization marked by a brutal concentration of wealth, by extreme social inequality and by a conception of progress centered, primarily on economic development, conditioning the social as a dependent variable"²¹. And that " the history of

street children is the saga of the poor childhood in Brazil that before the 80's would be hidden in the state shelters"²². What then has been happening from the 80's on, then?

¹⁹ Dimenstein, Gilberto, "Cidadao de Papel", supra note 1 at 43,44.

²⁰ Minayo, Maria Cecília de Souza. "O Limite da Exclusao Social: meninos e meninas de rua no Brasil (The Limits of Social Exclusion: street boys and girls in Brazil)"Hucitec-Habrasco.Sao Paulo/Rio de Janeiro. 1993.

²¹ *Id.* at 20.

²² *Id.* at 18.

Following its historical formation, the street children phenomenon seems to have been built over the years. Part of the Brazilian recent history told by Bicudo give an idea about the overall context.

“The decades ranging from the 60's to the 80's are characterized by deep changes in all the spheres - economic, political, social and cultural - in Brazilian society. The results seem to be marked by, on one hand, the State authoritarianism, permeated by corruption and on the other, by the social-economic marginalisation of extensive segments of the population. Metropolitan poles also developed qualified by an undisciplined urbanization, sometimes co-responsible for the bad life quality that we all bear”²³. Not adjusted to these recent changes on the new national panorama, the cities have been the scene of perpetuating bouts of violence, as understood by Bicudo, who is currently a member of the National Congress.

The violence against children, the phenomenon of street children being the public face of this violence, can also be understood as a consequence of this process of social-economic exclusion.

Having lived with 25 years of military dictatorship (1964 to 1989) the society still is learning the first steps towards its political emancipation, that is, its full capacity to exercise its citizenship. Supported by a formal democratic system, on the other side, the executive, legislative and judiciary powers still do not fully recognize and give solutions to the problems concerning the underprivileged.

In the case of street children, for example, reproducing Minayo words, "this phenomenon can only be understood on the macro-articulation between the

²³ See Bicudo, Helio, supra note 17 at 10.

problems of the rural and urban sides, of the direction given to the agricultural and industrial policies, such as of the international relations, in what the national economic agreements are always placed in a relation of ambiguity with the social debit of what the national worker population is creditor." ²⁴

During the 80's, there wasn't just a stagnation of the economy, but a moving backwards. The levels of poverty and distribution of wealth, as evidenced above, from this period gives an idea of the context. It also indicates the children from 0 to 17 years were the most victimized by that movement.

In 1990, 53.5% of the youngsters in Brazil lived in families earning half minimum salary *per capita* a month (...) representing 32 million children had an income close to half the minimum salary.²⁵ The concentration of wealth in Rio de Janeiro state speaks for itself. In 1992, the United Nations Report on Human Development affirmed that the 20% richest Brazilians count for 26.1 times the income of the 20% poorest – that is, being considered one of the worst income distribution in the world. The total Gini's rates, estimating the distribution of income, according to IBGE(1996) – Brazilian Institute for Statistics and Geography – in Brazil range from 0,602 in 1986 to 0,590 in 1996. The monthly income rates (over 10 years-old) estimated by IBGE in the Southeast, where Rio de Janeiro confirm the problem of concentration of wealth. In the Southeast, 10.7 % of the population earns more than 1 minimum wage (around U.S.\$ 80), 12.2% earns between 1 and 2 minimum salaries, 9.3% receives between 2 and 3 minimum wages, 9.9% gains between 5 and 10 minimum wages, 4.7% earns between 10 and 20 minimum

²⁴ See Minayo *supra* 20 at 21.

²⁵ See Dimenstein, Gilberto, *supra* note 1 at 53.

wages, 4,7% makes between 10 and 20 minimum salaries, 2,6 % earns more than 20 minimum wages and 38,7 % earn no income at all.²⁶

The most tragic implications of this context seems to fall on the young generations; and, because of a lack of effective precautions, it is being intensified throughout the years. If there were only children on the streets, in the past or even in the 80's, there are generations of street children by the end of the 90's. According to UNICEF there are 100 million street children that are found in the world from this, 40 million are in Latin America, between 25 to 30 million in Asia and 10 million in Africa.²⁷ Estimations of the number of street children in Brazil range from 200.000 to 10 million, in the beginning of the 1990's.

There is no official data about the number of street children in Brazil. The Brazil's Institute for Statistics and Geography – IBGE - doesn't collect data related to the population who lives on the streets. The institute gathers information on the size of the population from domiciles, that is, accordingly, the locus where the citizens reside, physically independent and separate, constituted by one or more chambers. Information about street population is sporadically searched by governmental agencies based on estates or non-governmental organizations.

2. Street Children Profile: 80's and 90's

One of the pioneer researches about street children in Brazil was developed in 1984 by Rizinni,²⁸ in Rio de Janeiro city. Finding, at the time only two surveys about

²⁶ IBGE, "PNAD", *supra* note 2.

²⁷ Medicus Mundi, "Los Ninos de la Calle - Dossier Informativo de Infomundi, Servicio de Informacion y Documentacion sobre el Tercer Mundo"(The Street Children – Infomundi's dossier, Information and documentation about the Third world services) , 1996.

street children in Brazil and no other article published in Rio de Janeiro, Rizzini decided to approach to this problem, by drawing its profile, in order to understand why they were on the streets.

Interviewing a group of 300 children, from 5 to 18 years-old, met at downtown and south Rio de Janeiro city, three groups of street children living on the streets were distinguished. Using the family as a reference, for differentiating three basic groups, it was identified a) the group of sleeping at home everyday constituted 70%, b) the ones going home occasionally, constituted 26% and c) the minority that had lost his or hers family ties. It is concluded that the majority of the children had family ties and came to the streets to work and help their families. This was the case of 258 children from that universe.

Some other characteristics revealed by the research were that 87% were boys and only 28% white children. Besides constituting a majority of black boys, still, it was further concluded by Rizzini that most of the kids came from the *favelas* and periphery neighborhoods. About the number, Lusk (1989) ²⁹ says that there are around 7 to 10 millions in Brazil.

Rio de Janeiro, the second biggest urban center in Brazil, congregating around 11 million people now a days, is also a center of strong concentration of wealth as was particularly noticed in the end of the 80's in official data analyzed by Saboya. Accordingly, Rio de Janeiro city sheltered 27.7% of the country's poor urban population

²⁸ Rizzini, Irene. *A Geracao de Rua – Um Estudo sobre as Crianças Marginalizadas no Rio de Janeiro (The Street Generation – an analysis about the marginalised children in Rio de Janeiro)*. Universidade Santa Ursula. SEPUB.1984.

²⁹ Lusk, Mark W. E Mason, Derek T. “Meninos e meninas ‘de rua’” no Rio de Janeiro in Rizzini, Irene (ed.), *A Crianca no Brasil hoje: desafios para o terceiro milenio*, Editora Universidade Santa Ursula, 1993.

in 1989. There were, in absolute numbers, 2.98 million people earning ½ minimum salary a month.³⁰

Another particular characteristic of the South East of Brazil, where Rio is located, is the presence of families living on the streets. The same happens in the North East.

Although sleeping everyday, once in a while or never in the street, it can and should be assumed that the definition should be depending on whether they would spend most of their time in the streets or not. According to the UNICEF, the concept of streets is broad, encompassing vacant lots, unoccupied houses etc. Street children are classified as those whom these areas became their habitual domicile and source of subsistence. Furthermore, street children are those who are found unprotected, who have are not under supervision or adequate orientation by an adult.

The data collected by interviews conducted by Rizzini may not be totally correspondent to the truth in some aspects, such as on the point of their relationships with their families and how frequently they go to school, due to the fact that , using the words of Lorenzi to explain it , " the plans they make for their lives are elusive, belong to the world of illusions, that is, a dream"³¹. The projections they make about their lives in the present follows the same criteria, reflecting their own ideals and values accepted and exalted by the society in general.

It gives a very good picture, though, about the reality of street children, in the middle 80's in Rio de Janeiro city in fact approximate to what was concluded

³⁰ Saboya, Joao, "Distribuicao de renda e pobreza metropolitana no Brazil"(Income distribution and metropolitan poverty in Brazil), *supra* note 20 at 46, 47.

³¹ Lorenzi, Mario. "Crianças Mal-Amadas", at 24.

by the other above mentioned works. It can be noticed that, in the below passage that follow, there are some differences, from the just described *scenario* prevalent in the middles 80's.

Levenstein³² warns about the danger of stereotyping street children by asserting as their profile, what is a typical street children. She concludes, though that basically, " the majority of street child are workers who return to their families at night."³³ And that " A highly visible minority of street children have little or no family links and live in a sub-culture in the streets"³⁴. Minayo also affirms that street children "Are children whose necessity, material, for affection or for protection, paradoxically, impel them to the streets"³⁵.

The basic difference that can be noticed, from the mid - 80's to the mid - 90's is the consolidation of the problem. While in the 80's, the street children were in a small quantity and seemed to still maintain their family ties, coming to the streets basically to work, today, the picture changed. Besides the quantity, other factors have been added to the first picture. Radicalized urban problems such as the collapse of the public services, not prepared for the real demand of the people who cannot afford to pay for private education, health-care and transportation and, who are unemployed or subemployed, domestic violence, child abuse, parental absence, alcoholism, drug trafficking ,police violence against the low income communities, high rates of concentration of wealth are all

³² Levenstein, Susan. *Street Children in Brazil*. Background, problems and some innovative programs. UNISA, Center for Latin American Studies. June 1994.

³³ *Id.* at 6.

³⁴ *Id.* at 6.

³⁵ See Minayo, "Quando Conhecer e parte do Compromisso Social (When knowledge is part of the social commitment) "- Supra note 20 at 19.

circumstances, among others, that conform the phenomenon of street children.

The lack of social references, such as a family, a community or a school is common among today's street children. Currently, it is the easy to find generations of children from the streets and a more expressive number of children that had never a home or lost their family ties.

In 1997, while training public servants who work at State institutions for children considered in irregular situation to deal with the new legislation for the protection of children's rights, I learnt more about the street children's universe. A group of 10 servants told me about their difficulties in dealing with street children, at the shelters. From their point of view, the street children are distinct from the other poor children that are in the shelters. From all the small examples they cited, such as cases of not taking orders, of having no concepts of self-hygiene, of facing extreme difficulties on learning, of mistreating their own bodies, such as when they got hurt , they wouldn't look for a doctor and other instances. I had a better picture of the implications of living on the streets on a permanent basis. The street children don't easily accept what are accepted as routine because basically they have no opportunity to have a regular life in the streets.

Breaking some myths about street children, such as that they are abandoned by their parents, and that they go to the streets to seek freedom or only to work and that there are equal opportunities for all, as Rizzini concludes, or even that they are so few that there is no need for special policies is essential to a further analysis of the problem of street children in Brazil and in Rio de Janeiro city.

Levenstein detects, among other experts, the role played by stereotype on modeling the problem in Rio de Janeiro, as an attempt to make it fit somewhere in the local culture. She explains how ideas are created in society to deal with the problem. "Inability to deal with the unknown and to determine effective social control has led the dominant clan to define as pathological certain types of behavior which fail to fit into its norms and laws."³⁶

Although family ties and family environment are important to understand children's well-being, it can be dangerous to use it as a criteria to determine how 'streety' is a child, that is, to determine if the children can be classified as street children or not.

The families, as clarified in the above passages are in a very tragic way victimized by the unequal process of development in the country. A great number of families are "abandoned", to use, by analogy, a term commonly applied to street children. Therefore, they cannot provide their offspring any sort of care or protection or fulfillment of a child's needs. Still, because it centers the problem on the family, from what it can be inferred that the families are responsible for letting their sons and daughters go to the streets. Following that logic, Rizzini shows that even the children blame themselves for what happens to them, and puts the failure on their backs. "I could have studied, but I would sleep in the school and the teacher expelled me."³⁷

They blame themselves, instead of blaming the school for their non adaptability. Still, the classification has been used by the society and by the State in order to deny the existence of the problem : if there is a family behind, they are not street children or

³⁶ See Levenstein *supra* note 32 at 10.

³⁷ See Rizzini *supra* note 28 at 5.

alternatively, it is their option.

The logic of eliminating the ones that choose to go to the streets is a solution found by segments of the civil society that sponsors and supports the action of death squads, which will be more extensively studied. " Most people think that street children are responsible for their own situation. They are marked down as aggressive and dangerous youngsters, and considered rude and lazy. The street children often react in real life in ways which help reinforce people's prejudices. There are many reasons why they do so - for instance, the contempt in which their culture is held by others and the few opportunities available for them to leave the streets." ³⁸

Unfortunately, by the end of the 90's, there is in Brazil and in Rio de Janeiro city, a social segment such as the street children. Ignoring it is not even possible. There are street children in every neighborhood of the city. Identifying their profiles, as children that spend most of their time in the streets seems to be the most appropriate option in order to face the problem. Simultaneously understanding their universe, in all its peculiarities, is a key to address the problem. Understanding in what aspects they deserve more urgent measures and special policies that can fit into their reality and really reach their needs is fundamental .

In the beginning of the 90's Lusk ³⁹ offered a new picture of the profile and living conditions of street children, as mentioned above. Such as Rizzini did in 1984, street children were interviewed. From 113 children interviewed in Rio de Janeiro City, divided

³⁸ See Levenstein, *supra* note 32 at 12.

³⁹ See Lusk and Mason, "Meninos e meninas 'de rua' no Rio de Janeiro" *supra* note 29, at <http://cogeae.pucsp.br/~sircri/banco/vida/trabalho/prua.html>.

in four groups. Children that work and have strong family ties corresponded to 20% of the total. Most of them are boys who not necessarily live at their parents residence, but that still maintain a close relationship with their parent(s) or other members of their families. They often work shining shoes, selling candies, watching parked cars etc. They rarely get involved with small crimes or prostitution. The second group constitutes 51% of the total. They are children who have weak family ties. They stay long periods on the streets, 24 hours a day, in different neighborhoods of the city. They often affirm that “home” is far away and that there is no food there. They also frequently refer to domestic physical abuse. Most of the children belonging to this group come from large families that migrated to the city. More than half the group admit involvement with drugs and criminality. Still, 2/3 have already been living in a State Shelter. The third group is composed of 15% of the total being constituted by children that are older than the others and have no more contact with their families. They spend all of their lives on the streets. Most of them are runaways and don’t know where their families live. Furthermore, 65% have already suffered physical and sexual abuse, 80% use drugs, 80% have already been sheltered at State Institutions and 60% admit involvement with criminality. The fourth group is constituted by children who live with their families on the streets. It corresponds to 14% of the total and is generally composed by migrants. Women head 64% of these families.

A brief comparison of this picture with the one drawn by Rizzini evidences the tendency for the 90’s. The tendency, as it can easily be perceived, is the aggravation of the problem. Victims of all forms of exploitation, also suffering physical and sexual abuse,

getting involved with petty theft and prostitution, dealing with drugs, the street children of the end of the 90's are completely unsafe and disregarded by their families, by the State and by the society.

3.Brief description of facts: living in the streets of Rio - The Killing of Children.

The violence is also a manifestation the aggravation of social-economic problems.

The systematic killing of slum and street children have been extensively documented particularly since 1985. In April, 1996, *Jornal do Brasil*, a popular and traditional Brazilian newspaper published an article ⁴⁰affirming that 6.033 children were assassinated

in 10 years(1985-1995) in Rio de Janeiro metropolitan area. The estimation was made by the Second Infant and Juvenile Court based on the a local non-governmental organization investigation and on the Federal Police data. Comparatively, the rate of homicides against children has been increasing. In 1985, 172 children were killed. In 1992, 450 children, in 1993, 1.152, in 1994 1.226 and in 1995 1.138. The percentage of children killed in the estate, among the total rate of homicides has also been increasing every year: 4% (1986), 4,1% (1987), 4,9% (1988), 5,7% (1989), 5,4% (1990), 4% (1991), 5,9% (1992), 8,2% (1993).

The International non-governmental organization Human Rights Watch published a report – Final Justice – stressing the main reasons why children are killed in the streets of the cities in Brazil. HRW reaches a conclusion that the main reason are the increasing impoverishment of the population, denied access to education, deep social, economic and

⁴⁰ Nobre, Carlos, Rio exterminou 6.033 menores em dez anos (Rio killed 6.033 minors in ten years), *Jornal do Brasil*(*Brazil's Newspaper*), April 28, 1996 at Cidade.

racial problems and impunity.

In its 1992 annual report on the killing of children in Rio de Janeiro, CEAP, which is local ngo, documented one typical case. The body of a 9 year-old Patricio Hilario da Silva was found wrapped up in a rug in Ipanema, which is a fashionable neighborhood in Rio. Strangled to death, a note was left near his body: "I killed you because you do not study, you do not work and you have no future. The government can't allow the streets to be over-run by juvenile delinquents."⁴¹

Police inquiries of reported killings are infrequent and often defective and incomplete when undertaken. Of those inquiries, few are referred to the Judiciary. A very common situation is, for instance: the child is killed, often executed, by a military policeman in a slum. The same policeman takes the child to the nearest hospital and reports the fact to the competent police station. The description of the fact is diverse from the truth, though. The policeman often reports the murder as a death caused by the victim's reaction to the police forces. The victim is also frequently accused of drug dealing and of carrying a gun. The report will, then be sent to a military police station. But, since the crime was committed in self-defense, as it was reported, and since the victim's families are afraid of the police and therefore do not offer any other version of the facts, the investigation doesn't proceed. When they are referred to the Military Courts, the chances that a military policeman will be convicted are few.

The *Candelaria* case is the first case involving the murder of street children, to be

⁴¹ CEAP - Centro de Articulacao de Populacoes Marginalizadas (Center for the Advocacy of Marginalised Populations), "Relatorio anual sobre o exterminios de crianas e adolescentes no Rio de Janeiro (Annual Report of the killing of children and adolescents in Rio de janeiro)"

Referred to Courts and to submit the defendants to a public trial. In the sentence that condemned Borges, one of the defendants, to 309 years of imprisonment, it was affirmed that he was “ oriented toward the extermination of defenseless and socially marginalised children”⁴². In July 23, 1993, in the middle of the night, 8 street children were killed and several others were hurt, when a group of off-duty policemen opened fire over a group of 50 street children that were sleeping outside the well-known *Candelaria* Church, in downtown Rio. One of the survivors, Wagner dos Santos, gave testimony and identified the policemen involved. Wagner was severely threatened and shot once again, because of his testimonies. He fortunately survived once more and insisted on testifying on the case. But for his own safety, he moved out of Brazil.

According to the Human Rights Watch and to CEAP, the killings are executed by death squads, in the first place, followed by policemen, in or off-duty and retired, besides traffic dealers, friends, parents. Most of the victims are Afro-Brazilian boys, from 14 to 17 years-old. The majority don't use drugs, don't commit crimes, don't live on the streets and are not member of gangs. “They are just poor”⁴³ says Human Rights Watch .

⁴² Human Rights/Americas' Watch. Final Justice- “Police violence and death squads against adolescents in Brazil”, 1994 at

⁴³ Id.

III- The Law

1. Introduction

The existence of street boys and girls in Brazil is dramatic. From the descriptions and analysis developed so far, it can be perceived an intensification of this problem, despite the gradual economic stabilization and disrespect the establishment of democracy.

The legislation has been extensively reformed. The 1988 Federal Constitution encompasses the guiding principles belonging to the new democratic order, after the long years of military rule. Under the new democratic order, the struggle for the recognition of rights has been the realm of the social movements trajectory and discourse in Brazil. It has been demonstrated that there is a huge gap between the universe idealized by the legislation and what has been in fact implemented. Nevertheless, the promulgation of the 1988 Constitution and of the 1990 Children's and Adolescents Statute, for instance, have been valuable sources in order to cover this gap.

Therefore, I will make considerations over the institutional response for the problem of street children, through the juridical apparatus; that is, in what extent the 1988 Constitution and the 1990 Statute create conditions for the implementation of the rights of all children, with no discrimination, including the rights of street children. Which provisions are particularly relevant for street children and how it have been applied. Moreover, the Convention on the Rights of the Child will be analyzed and applied to the case of street children, as a complementary source of rights, due to its legal status of constitutional norm, as it will be opportunely explained.

2. The new constitutional order: 1988 Federal Constitution.

2.1. The Process.

The Brazilian constitutional history reflects the country's unstable political trajectory, as it has been drawn by successive governments, under the influences of the existing political forces. The Constitution endorsed in 1988 is the 6th since the republic was proclaimed in 1891, besides the Acts that amended previous Constitutions made by the executive to accommodate its interests.

During the 30's, the Brazilians passed through two Constitutions: 1934 and 1937. Both reflected a tendency to the centralization of power on the executive. The 1937 Constitution, though, was evidently manufactured under fascist influences. It was popularly called " the Polish". The constraints imposed by the 1937 Constitution on the free exercise of rights and on the others institutional powers were astonishing. Congress

was once dissolved and thousands of citizens were irregularly arrested, accused of being subversives and communists. There was at least one case that had a great repercussion of a woman sent to a Nazi camp. Olga Benario was a German married to the leader of the communist party in Brazil. Speech, association and other fundamental rights were severely violated under the discretionary power given by the Constitution to the executive.

A new Constitution was endorsed as soon as the President and the political forces he represented, were no longer hegemonic in 1946. This Constitution though was crucially modified by a variety of Acts, particularly after 1964, when a military coup took place. Nevertheless, it lasted until 1967, when the 5th Constitution was elaborated by the junta in power, in charge of the government of the country. They wanted to reshape the country's Constitution according to the spirit of the "revolution", as they used to call the military coup.

The supreme law of Brazil was no longer an instrument to reestablish democracy but aimed to impose the "revolution" ideals. The extinction of the political parties, the reform of the judiciary, the extension of the power of the military courts, the indirect elections and a variety of attacks on civil liberties and rights in general marked that period of martial rule. Future Acts during the military dictatorship allowed the government to suppress the democratic institutions and civil liberties. The AI-5, or Institutional Act no. 5, allowed the President to declare, by decree, the recess of the Congress, of the states' Houses of Representatives, City Councils and invested himself with all the legislative power. It also allowed the president to declare the nullity of mandates and to suspend political rights for 10 years. Many people were arrested tortured and killed during this

time as a reaction to their opposition to the government.

The Roman Catholic Church played an important role in advocating for the rights of prisoners. Human Rights defense centers were created and Ecclesiastic community based centers (CEB) were installed all over the country. From 1975 on, besides its concern about the defense of prisoners and general human rights violations, the church engaged on the campaign for amnesty, which was approved in 1979, when, gradually, democratic institutions started to be reestablished. Besides the church, which initiative was expanded and embodied in the Human Rights National Movement, and on a variety of other bodies, such as the Commission of Justice and Peace and many other human rights defense centers, the Brazilian Bar Association (OAB), the Brazilian Press Association (ABI) and international organizations gave a great effort for the reestablishment of civil liberties in the country.

After the Amnesty Law during the 80's, the society restarted to Re-assemble in associations, unions, social movements in general, struggling for democracy. Many legal innovations took place from 1979 on during the 80's allowing that movement to happen, without severe restraints, common since 1964, when the military rule was put in force. Electoral legal reform was done, and two-party system was extinguished. Once political parties could be organized, new parties were formed. In 1982, direct elections for the states executive were allowed. In Rio de Janeiro, for example, a politician who was long in exile, Leonel de Moura Brizola, was elected as a Governor. Congress, Mayors and state and city representatives were also elected by franchise, in 1982, for the first time since 1964.

Although in 1983 there were widespread public movements claiming the establishment of direct elections for President, this only happened on 1989. The political reforms continued to be pursued though, and Congress elected a civilian to be President in 1985. The new President still had strong ties to the regime, and had to govern under the 1967 Constitution and 1969 Act. New members of Congress were elected in 1986 and elaborated the 1988 federal Constitution. From 559 congressmen elected, 305 belonged to the opposition to the government. This political context created a plural atmosphere which resulted in the 1988 Constitution.

2.2. 1988 Federal Constitution and the protection of Human Rights.

The 1988 Constitution represents a significant advance in many aspects of the country's life. It reflects a moment of great enthusiasm since it marked the beginning of a new era when democracy was again being consolidated. It is also a result of negotiations between social movements and the Congress, in charge of drafting the new document.

There was an imperfection in the process of elaborating the Constitution that opened the channels between the ones responsible for the elaboration of the document and the population. This imperfection relies on the fact that instead of calling elections for a national Constitutional Assembly, separately, in charge only of drafting a new Constitution behind, closed doors, as every law is made, the President, elected by Congress in 1985, called for elections to Congress. Congress, then, embodied as a

constitutional assembly, elaborated the Constitution, under all sorts of influences.

The context in which the document was drawn was strongly criticized. Scandals involving Constituent Assembly members, specially the ones that supported the situation parties, and lobby groups were routine. But I prefer not to consider whether the scope of the Constitution turned out to be the creation of privileges to certain groups, or still many other aspects that are extremely relevant also. As I have discussed above, the document abridges the spirit of the human rights documents and, simultaneously incorporates the claims and interests of many sectors of the civil society. For instance, non-governmental organizations and associations in general from around the country proposed drafts for two constitutional amendments, which were endorsed by 200.000 voters and presented to the Constituent Assembly. These proposals ultimately became the chapter on the rights of the child and the adolescent in the Constitution – passed by 435 to 8 votes. Furthermore, the women's movement had, as they evaluate, 80% of its proposals incorporated by the new document.

As Piovesan analyses, the new Constitution extended the protection over fundamental rights, by recognizing, as fundamental rights, not only civil and political rights, but also social rights and went further by granting the status of constitutional norm to human rights international treaties.

According to Perez Luno " The fundamental rights create an horizon of social-political goals, when establish the juridical relations between the state and the citizens and among the citizens themselves." ⁴⁴ And, further, Piovesan understands that in our Constitution, " The fundamental rights and guarantees are granted with a special

⁴⁴ Piovesan, Flavia. "Direitos Humanos e o Direito Constitucional Internacional (Human Rights and the International Constitutional Law)". Ed. Max Limonad. Sao Paulo, Brazil, 1996 at 63.

expansive power, projecting itself to all the constitutional universe and serving as an interpretative criteria for all the legislation."⁴⁵

This normative power derives from Art. 5, paragraph 1st⁴⁶, that creates a principle by which the enforcement of fundamental rights and guarantees doesn't depend on the creation of complementary norms. These rights and guarantees can be applied directly by the executive, legislative and judiciary powers.

Accordingly, Art. 5, 2nd paragraph⁴⁷, mentions that international treaties rights provisions in Brazil have the status of fundamental rights and guarantees. Therefore, the rights created by international documents to which Brazil is a ratifying part, can be directly enforced by the State powers. And, at the same time, the treaties generate individual rights, and not only obligations to the State. Although this principle doesn't apply to all international treaties, but only to human rights international documents. All the other treaties need to be enforced by the creation of complementary legislation.

Individuals are hence directly benefited by the human rights international documents, particularly when human rights international treaties ratified by Brazil constitute rights that are not prescribed by the national legislation. In this case, the International covenants add new rights to the national legislation. For example, Article 11 of the International Covenant on Economical, Social and Cultural Rights, providing the right of everyone to an adequate standard of living for himself and his family, including adequate food,

⁴⁵ Id. 42 at 63.

⁴⁶ 1988 Constitution of the Federative Republic of Brazil. Title II, Chapter I, Individual and Collective Rights and Duties. Article 5. Paragraph 1. The provisions defining fundamental rights and guarantees are immediately applicable.

⁴⁷ Id. Art. 5. Paragraph 2. The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party.

clothing and housing, and the continuous improvement of living conditions or Article 20 of the International Covenant on Civil and Political Rights, that states that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law are some cases noticed by Piovesan, as been assimilated by the national juridical system.⁴⁸

Piovesan cites another case involving the interpretation of a national statute under the New York Convention on the Rights of the Child, the 1984 Convention against torture, the Inter-American Convention against torture and the San Jose American Covenant on Human Rights. That case received great attention in Brazil since the Supreme Court decision, based on international treaties modified an article of a national statute, which is the Statute for the protection of the rights of the Children.

The Children's Rights Statute prescribed the existence of a crime of torture against children, as a special category. The means of executing the crime of torture, though, were not described. The first aspect of the case discussed by the Supreme Court was related to the coexistence of rules regulating coincident matters. In this situation, it is held that the primacy belongs to the norm that protects, in a case by case evaluation, the dignity of the human being, that has had his or her rights violated and it is irrelevant whether the norm is internal or international. In the present case, the existence of the crime of torture against children was affirmed. The decision was based on the following statement made by Justice Mello: " Brazil, by creating the crime of torture against children, revealed itself faithful to its commitments to the international order, particularly to the ones related to the convention on the Rights of the child, the convention against

⁴⁸ See Piovesan supra note 44 at 116.

torture, the Inter-American Convention Against Torture and the American Convention on Human Rights. It is necessary to emphasize (...) that this Federal Supreme Courts has a historical commitment with the preservation of fundamental values that protect the dignity of the human being." ⁴⁹

The 1988 Constitution was elaborated under the influence of international human rights treaties. It contains a number of articles inspired by international human rights law, such as the art. 5, III of the Constitution and Article 5 of the Universal Declaration of Human Rights, and Art. 7 of the ICCPR⁵⁰. On this example, the constitutional text has the same content than art. 5 of the Universal Declaration and shows little differences from the original convention. It demonstrates the intention of the framers to harmonize the constitution with the international law. The past Constitutions were limited to affirm values such as sovereignty and national independence; the 1988 document innovates by generating the principle of the primacy of human rights, on the management of interests and on the international relations. Therefore, it can be assumed that the Constitution imposes limits on the state sovereignty, submitted to the international human rights protection order.

In that context, the human rights treaties, received in the national juridical system as constitutional norms, are special norms, creating upon the state an obligation towards the individuals. The basic values of the Brazilian Constitutional order are: a) separation of powers ;b) federalism; c)direct, universal and periodical franchise;

⁴⁹ See Piovesan supra note 44 at 120.

⁵⁰ Constitution of the Federative Republic of Brazil, supra note 46. Art. 5, III. "No one shall be submitted to torture or to inhuman or degrading treatment.", Universal Declaration of Human Rights, Art. 5. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." and ICCPR Art. 7. "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation."

d) fundamental rights and guarantees.⁵¹

After the endorsement of the 1988 Constitution, Brazil ratified a number of international human rights treaties such as the Convention on the Rights of the Child, the Human Rights American Convention, International Covenant on Civil and Political Rights, and many others, despite a governmental resistance that still exists, such as the follows.

The government still doesn't recognize the jurisdiction of the human rights committee to receive individual petitions addressed to it, in cases involving violations of the ICCPR. The same situation is reiterated in the Convention against Torture and other Inhuman, Degrading and Cruel Treatments, towards the recognition of the jurisdiction of the committee against torture to accept individual petitions as well as the committee related to the Convention on the Elimination of all forms of Racial Discrimination, to examine individual claims. But, at the same time, the country recognizes the jurisdiction of the Court to examine and decide interpretative matters over the application of the Convention on the Elimination of all forms of Racial Discrimination.

Brazil also doesn't accept the optional protocol, of the ICCPR, concerning interstate communications, allowing States to hold cases against Brazil. The same limitation is reiterated related to the American Convention on Human Rights. Still, on the

⁵¹ Id. Art. 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on: I- sovereignty; II- citizenship; III- the dignity of the human person; IV- the social values of labour and of the free enterprise; V- political pluralism. Sole paragraph- All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution. Art. 4. The international relations of the Federative Republic of Brazil are: I- to build a free, just and solidary society; II- to guarantee national development; III- to eradicate poverty and substandard living conditions and to reduce social and regional inequalities; IV- to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination.

American Convention on Human Rights, Brazil doesn't recognize the jurisdiction of the Inter-American Court of Human Rights. The reports about implementation of the conventions such as the rights of the child are also an obligation not accomplished by Brazil, as pointed out by Piovesan.⁵²

" These actions seem essential to the complete incorporation of Brazil into the international scenario of the protection of human rights, as a Democratic State, based on the rule of law. Democratization implies not only reforms or transformations on the national level, but also on the international level(...) concerning the full commitment of the Brazilian State with the human right cause".⁵³

The incorporation of an international perspective into the 1988 Constitution in the children's rights area is not merely an imposition to a sole governmental initiative.

Chronologically, the discussions around the theme seems to have occurred simultaneously

at the international and national level. Pereira notes that " the role played by social organizations, through campaigns and debates with the governmental sector and civil society that dealt with children and adolescents, since 1985, deserves special attention".⁵⁴

The Permanent National Forum of the Rights of the Children and Adolescents was the main actor responsible for the ample social participation in the approval of the Constitutional Amendments with more than 200 thousand signatures, as above mentioned.

The Amendment's content sought to incorporate in the protection of the rights of the

⁵² See Piovesan *supra* note 44 at 262 to 270.

⁵³ See Piovesan *supra* note 44 at 270

⁵⁴ Silva Pereira, Tania da. *Direito da Criança e do Adolescente: uma proposta interdisciplinar* (Children and Adolescents Law: an interdisciplinar approach). Renovar. 1996. At 22.

children, what as, in fact, done by the Constitutional Assembly.

The Convention on the Rights of the Child was unanimously adopted by the United Nations General Assembly in November 20, 1989 with the participation of Brazil and as observes Pereira , it " is the outcome of the efforts of various countries that, during 10 years, sought to define which human rights are common to all children, to the formulation of legal norms that are internationally enforceable and capable to abridge the different conjuntural social-cultures between the nations. "⁵⁵ The Convention entered in force in September 2nd, 1990. It was ratified by Brazil in November, 21, 1990, after the endorsement of a federal law that creates the Statute on the Rights of the Child and the Adolescent - ECA - in Brazil, on July of the same year. The description and analysis of the relations between both norms will continue.

Before moving to this topic, though, it is important to consider that the 1988 Constitution embodied fundamental rights taken from the Universal Declaration of the Rights of the Child to which Brazil was a ratifying party in 1959. (Such as Principle 4 of the Declaration and Art. 227, &3, II of the Constitution : social welfare rights; Principle 2 of the Declaration and Art. 227 of the Constitution: supreme rights of the children – absolute priority; Principle 1 and Art. 227: non discrimination; Principle 5 and Art. 227, &1, II : disabled and handicap rights; Principle 7 and Art. 208: right to education etc.)

The Brazilian Federal Constitution is criticized by many jurists although it satisfies contradictory interests of diverse groups in the society. Despite the congregation of a whole spectrum of interests, what apparently seems to be a democratic aspect of the whole process, which the document is the product, scholars and jurists in

⁵⁵ Id. at 25.

general tend to agree at some adverse points. Junqueira Ferreira⁵⁶ concludes that the Constitution in its content and structure is more like a Code of Public Law. Besides, he points that the interests satisfied by the document are not structural, but circumstantial. Warning about his pessimism, he expresses also his concern about the implementation of the constitutional provisions. According to his evaluation, there is a need for 99 ordinary laws and 33 complementary laws. This is a problem due to the lack of formality in the way the document was drafted. As Goncalves Ferreira Filho⁵⁷ analyses, this juridical technical deficiency is one of the most evident characteristics of the Constitution. " The majority of the members of the assembly considered the formal aspects, that is, the juridical aspects to be secondary. Forgotten that a Constitution is a law, that is, a juridical document, that has to be enforced by jurists. "⁵⁸.

The Constitution purports circumstantial ideals, but still fundamental to the advance of democracy in Brazil. The assembly of diverse persons, contemplating divergent interests is another mark of the whole document. The process of drafting of the Constitution has been described in the present paper are its positive aspects towards a transition to a constitutional order. But despite these favorable aspects already commented, there is space for some criticism.

Firstly, the minimal attention given to the legal technique on the drafting of the Constitution reflects the level of commitment of the members of the constitutional

⁵⁶ Ferreira, Wogran Junqueira. "Comentarios a Constituicao de 1988 (Comments to the 1988 Constitution)". 1st. edition, Sao Paulo, Brazil, 1989 at 1.339.

⁵⁷ Ferreira Filho, Manoel Goncalves. Comentarios a Constituicao de 1988 (1988 Constitution commented) . Sao Paulo, Saraiva, 1990.

⁵⁸ Id. at 3

assembly, who were the same as the members of Congress, charged with the enforcement of the document. I am saying that based on what has been accomplished since the Constitution was put in force. It seems to me that there is a deep and strong element of authoritarianism in our political culture. The lack of formality in the drafting of the supreme law of all laws of a nation implies a low level of respect with the enforcement of its rules and, therefore, with public institutions that are created and maintained to guarantee the democratic order.

Many examples can illustrate this assertion. In the field of children's rights, there are two illustrative cases in Rio de Janeiro city that I personally took part in different ways, by being a lawyer at a non-governmental organization sector, at entities dedicated to at-risk children. The first one is about one of the two judges responsible for holding cases at the Courts for children and adolescents. After decision was affirmed by upper courts, the mayor refused to implement it. The suit was directed to the implementation of public policies directed to at-risk children, defined in the Constitution and to the statute of the rights of the children. The judge then called the entities belonging to the children's rights movement and, with the support of some members of the city council, asked for an audience with the president of the city council to denounce the mayor for the violation of his duties and other related charges. It didn't produce any result.

The other case had to do with the implementation of public policies, again based on the existing law. The physical, moral and psychological violence the children suffer when living at state shelters in Rio is common Knowledge. There are three institutes in Rio city to where the children are sent when they are accused of infringement of the law by commission of crime. One is temporary and the other two are permanent shelters for

boys and girls, separately. As a reaction to the conditions they have to bare while under custody and obliged to remain in these shelters, (state boarding-schools), they rebel, once in while, which rebellions are constantly publicized by the local press. Besides not being provided with a safe and healthy environment, the law and international standards, are still disregarded on points such as separation of the children by age, by physical complexion, and gravity of delict (ECA, Art. 123)⁵⁹. The Public Prosecutor for the Rights of the Children and Adolescents then sued the City to provide for adequate shelter conditions in conformity with the existing legislation. The judge conceded. The upper courts reaffirmed the decision, but the mayor refused to implement the order. Some time later, local NGOs had access to some pictures taken inside of the boys' shelters. The pictures displayed all sorts of aggressions suffered by the boys. Some of them displayed scenes of rape, perpetrated by the State agents in charge of taking care of the children. Based on the new evidence and also on recent episodes of rebellion at the shelters, some local NGOs decided to send the case to the Inter-American Commission.

Even after the Inter-American Commission recommended that the government should comply with basic human rights standards, and provide adequate shelters maintaining the minimum conditions of respect and dignity for the children, a new rebellion took place and 3 children were burnt to death with the fire they put on the mattresses inside one of the boy's shelters in 1996. Many of the other children were

⁵⁹ According to the ECA (Child and Adolescent Statute), the judge of the Infancy and Adolescence Court may submit the adolescent to a penalty that consists on deprivation of freedom. The adolescents may, then be place at State boarding-schools. The principles guiding the application of this kind of penalty are *exceptionality*, *brevity* and *respect* for the peculiar conditions of the developing person.

severely burnt.

In general terms, democratic institutions are still weak. The respect for the rule of law remains a target to be achieved.

2.3. Street children's rights under the 1988 Constitution

The 1988 Constitution brings important innovations in the area of the rights of children. The opening of the regime during the 80's allowing, albeit gradually, the free exercise of civil and political rights (such as the right to free expression, of assembly and association etc.) brought back to the public arena debates over political and social matters.

The Constitution was drafted under this atmosphere and, also, according to international standards for the protection of human rights. The 1988 Constitution incorporated the doctrine of integral protection of children by recognizing, for the first time, the fundamental rights of the children and the adolescents. Therefore, a new legislation was approved, accordingly with the new constitutional spirit. According with Pereira, "If the Brazilian constitutional history can be proud of the permanent presence of Declaration of the individual rights and guarantees of the citizen, the 88 Constitution, (...) introduce in the Constitutional Doctrine, the special declaration of the Fundamental Rights of the children and adolescents, proclaiming the integral protection doctrine and enshrining the specific rights that are universally recognized." ⁶⁰

On chapter VII of the Federal Constitution, particularly Art. 227 and Art. 228 contain the declaration of the fundamental rights of the children and adolescents, being

⁶⁰ See Silva Pereira supra note 54 at 24.

the source of all the recent innovations on the field of the rights of the children and adolescents in Brazil.⁶¹

By proclaiming the doctrine of integral protection, the children are subjects of rights and also, own special rights of persons that are developing and hence have special protection and absolute priority, as compared with adults, in the implementation of their rights.

As has been described, the marginalization process that affected the lower income classes in Brazil during the 80's created an adverse environment for the protection of children's rights. The problem of street children was already evident by the late 80's. Indeed it is, if not the worst, one of the most serious effects of the 'lost decade'.

An increasing concern about the rights and living conditions of the children, particularly the ones raised or born in low-income families, is registered by some works, articles etc. and also by denounces made by civil society organizations, during the late 80's in Brazil.

Although, at this time, the 80's, it can be felt that a special focus on the specific problem of street children was still poor. Only in 1984, the 1st Latin American Seminar for the Communitarian Alternatives for the Services for Street Children, in Brazil. The MNMMR – National Movement of Street Boys and Girls - was created in 1985. The ongoing violation of the rights of the children living in state shelters, working in the

⁶¹ Art. 227: *It is the duty of the family, the community, the society and the State to ensure, Children and adolescents, with absolute priority, the right to life, health, nourishment, education, leisure, to professional training, culture, dignity, respect, freedom and to family and community life, as well as to guard them from all*

forms of negligence, discrimination, exploitation, violence, cruelty and oppression.

Art. 228. *Minors under 18 years of age may no be held criminally liable and shall be subject to rules of the special legislation.*

streets and deprived of their fundamental rights started to be publicized, through press, literature and even movies such as *Pixote* during the 80's. The movie *Pixote* narrates the living conditions of the children in State shelters, its present and future implications on their lives, such as becoming street children or even being killed, while in the shelters, submitted to State custody.

One of the relevant provisions of law that was a hurdle, in the spectrum of children's rights in Brazil, by the time the Constitution was discussed, was the Minors' Code (*Codigo de Menores*), that is, the existing law that regulated children's rights issues. The *Codigo de Menores* was put in force in 1979 and it fundamentally disregarded the spirit of the previous human rights documents ratified by Brazil, such as the 1959 universal Declaration on the Rights of the Children.

The Statute of the Children and Adolescents (ECA) was the new legislation. Therefore, theoretically, children were strongly benefited by the new Constitution. This was specially true for the children who needed special protection, or who needed the protection of the law, on a routine basis in their lives.

In practice, though, the enforcement of the law is problematic, and this will be analyzed in some of its aspects.

3. The Children's Rights Law in Brazil.

3.1. The 80's: the Minor's Code and the social policy it represented.

The minor's code was put in force in 1979. It was the valid legal document that regulated the relations between the State and the children in Brazil, until the Children's and

Adolescents' Rights Statute was endorsed in 1990.

The Minors code and the 1990 Statute are the two most relevant legal documents to be evaluated in connection with the problem of street children. The Minors' Code is the previous reference from which the 1990 statute has departed. Its inheritance certainly influenced the process of assimilation and enforcement of the present 1990 statute. The Minors Code, such as the FUNABEM-National Foundation for the minor's well-being (*Fundacao Nacional para o Bem-Estar do Menor*) created in 1964 are marks of the 'past'. The 'past' was a period when children and adolescents who didn't belong to the middle or upper class, or who were orphans, and needed State protection were called minors.

Researching about the children's status in Brazil, through the media, one could find, particularly before the 90's, articles under titles like " Minor robs children", for instance. The minor was the marginalised child and the children, the 'wealthy' one, that didn't collide with the existing and generally approved and expected social order.

The FUNABEM was responsible for the elaboration of the Minor's Well-being National Plan (PNBEM). The creation of FUNABEM was to transform the State regulation over children's issues. The previous national entity responsible for formulating social policies addressed to the 'minor', SAM - Servico de Assistencia ao Menor (Service for the assistance of the minor) was known as repressive and ineffective. Besides, the government began to notice a growing problem of marginalization, during the 60's, specially felt in the cities. The children were, at the same time, the most vulnerable social strata among the population and, still, the biggest, corresponding to 52,93% of the population. In 1970 there were, according to the government, 49.378.200 million

children, out of which one-third (approximately 16 million) were marginalized. Therefore,

when the government evaluated a new national plan that should be drawn up, it was aware of that this plan should apply to the new context and also express the ideals of the military government, recently empowered, through the already mentioned 1964 military coup.

FUNABEM, according to its statute, intended to adopt the means to prevent and correct the causes of the children maladjustment. The FUNABEM policies were elaborated, according to Rizzini, under the inspiration of the Universal Declaration of the Rights of the Children. The well-being of the child should be achieved by the provision of the children's basic needs, such as education, recreation, love, social security etc. Other provisions, such as that the social-economic strengthening of the family can be found on the FUNABEM statutes, as pointed out by Rizzini.

The progress was only apparent, though. Even though prevention was the priority of the FUNABEM policies, prevention meant to isolate the marginalized minor, so that he or she could be rehabilitated and then re-integrated to the social life. The protection of the family, which was another relevant aspect on the FUNABEM's policies was in fact based on an abstraction. It was supposed to depend on the support for Christian values by all the society, since the family was considered the basic cell of the society. Everyone then should be against deeds that would offend the Christian moral, in the name of the protection of the family. In the name of the family, oppressive moral and social values were imposed on

the society. It was also a mark of the military regime that aimed to enforce its authority, by

excluding a variety of creeds, thoughts and ideals. A number of official policies, during this period were established, based on the Christian morality, on the defense of the family.

Marxism-Leninism was considered offensive to the Christian family values. Books were prohibited to be launched, besides all related civil liberties, that would express offensive values. It was part of the anti-Communist strategies of the military dictatorship.

FUNABEM and the public policy it represented, though couldn't attain the roots of the problem of exclusion of children. As narrates Rizzini⁶², a State evaluation (1980) of the effectiveness of the national policy addressed to the 'minor' concluded that there was an intensification of the problem of children marginalization disregarding the policies implemented by the government. There were around 25 million marginalized children in Brazil meaning that the PNBEM wasn't enough for the dealing with the problem of the marginalization of the children.

" The State undertook the tutelage, guardianship of the abandoned minor or that committed an infringement of the law and the policy turned to have the character of mere assistance, in which the main deed was to shelter and to feed the abandoned children and adolescents of the country."⁶³

The FUNABEM policies on the execution of the PNBEM were drastically changed during the 70's and 80's. The failure of the measures previously taken and the impositions of democratization, specially felt during the 80's, provoked the sniff in the

⁶² Rizzini, Irene and Piloti, Francisco. "A Arte de Governar Crianças(The Art of Governing Children)". Instituto Interamericano Del Nino. Rio de Janeiro, Brasil, 1995.

⁶³ See Silva Pereira supra note 54 at 19.

direction of the policy . Efforts were made to understand the problem that involved the marginalization of children, not as an isolated phenomenon, but as part of a system of exclusion. In 1984, as cites Rizzini, a FUNABEM official statement expressed the change of perspective: " A national policy for the minor's well-being - given that the minor is the children and the adolescent victimized by the process of social marginalization - can be only conceived together with a national policy for the social well-being, where the child, the adolescent, the young-adult, the adult and the senior be efficiently satisfied in their basic needs, in their families and in the community.⁶⁴ (FUNABEM, 1984, p.10)

This is a crucial change of perspective towards the problem. To the country's minors was accorded the status of children and adolescents. They started to be seen as victims of an exclusionary social-economic process and understood with their complexities, in all its human dimensions. Besides, the social policies addressed to the children were not seen merely as an obligation of the State in order to control a social problem. The marginalized children, finally had the right to be regarded in all their needs, by the State. Gradually, during the 80's, the strong state centralization of power - on the federal government - over policies towards the child was substituted by the decentralization. A new social policy started to be conceived. The existing policy was based on correction: the problem, as it was seen, was the contrast caused by the those children in an ideal social order. They were careless, abandoned, then, the State had to take care of them, save them from becoming criminals. The focus wasn't to combat the source of inequity, but the effects of the problem, that is, the at-risk or excluded children.

The 1979 Minors Code was part of this context and also of the new phase, when

⁶⁴ See Rizzini and Piloti supra note 62 at 10.

these changes in the State policy of towards the children occurred in the 80's. Rizzini notes that a move towards the community was made by State agencies. The government was opening the channels to the people's influences and inclined to learn from their experiences in dealing with problems such as the marginalization of children. But even now the move was gradual. Further changes in the way the State would deal with excluded children could only be felt after the endorsement of the 1990 statute.

Before that, the Minors' Code supported the doctrine of irregular situation. By this doctrine, there were two kinds of children: the ones in irregular situation and the ones in regular situation. The Minors Code was directed to the first group, that is to the ones who needed major protection. There were 6 situations, by which the child would be considered in irregular situation, according to the Minor's Code:

1. Deprived of essential conditions of subsistence, health and obligatory instruction, though eventually due to the lack, action or omission of the parents or of the one responsible for the child and their manifested impossibility to provide it.
2. Minor victimized by maltreatment or immoderate punishment by parents or anyone responsible for the child;
3. Minor under the threat of moral danger;
4. Minor deprived by the legal representation of his or her parents or one responsible for him or her, due to their absence;
5. Minor expressing a deviant conduct, due to the serious inadaptation to the family or community
6. Minor that has committed an infringement of the law.

The protection though was provided by punishment and correction under the prevalent view that the marginalization of children in a society is caused by the individual and not social-economic elements. In practice, such prevention meant isolation and separation of the marginal from the society so he could learn how to fit. On FUNABEM early years, the doctrine of irregular situation didn't represent the new age of rights, just arising in the 80's.

Unfortunately, the Minors' Code perpetuated a culture of discrimination against marginalized children that can still be felt by street children today. This culture contaminates the State institutional apparatus and the mentality of a great part of the population - and even the children themselves, as was pointed out above. The problem is located in the children themselves. The children wouldn't be regarded in their whole context. These are the main reasons why the Minor's Code was criticized by many children's rights advocates as a limited, discriminatory and punitive law. It was also deeply criticized by legal scholars, jurists and lawyers. Children and adolescents were submitted to arbitrary and violence due to the non observance of the principles of juridical science, frequently affronted by the Minor's Law, based on a 'odd and extravagant Code that abandons principles and fundamental rules of the law"⁶⁵, according to Silva Pereira, in her opinion about the Minors' Code.

The Judicial System was another condemned creation of the Minor's Code. The Judge was always paternal. This was also the characteristic of the public prosecutor even when he or she had to ask for the imprisonment of the children at a Police Station for

⁶⁵ See Silva Pereira, supra note 54 at 48.

the "protection" of the Minor. But this Police Station was not in charge of investigating and pursuing the adults that would violate children's rights: the policemen would handcuff and imprison "minors".⁶⁶ The solution given by the State to the children that were disregarded in terms of basic needs was to lock the child in a state shelter. The marginalized child was regarded as one carrying a pathology.

Those children have been treated as a threat to the society throughout the History of Brazil. Institutionalizing was the solution, based on the social control policy, which was the only social policy devoted to children in Brazil until the advent of the 1990 Statute.

3.2. The Children's and Adolescents Statute: the tendency of the law in the 90's.

The Child's and Adolescent's Statute (*ECA- Estatuto da Crianca e do Adolescente*) represents the formalization of a new approach towards children's rights in Brazil. As described above, a move from the old paradigm to deal with the problem of marginalised children was in process from the 80's on, due to its failure to prevent children from becoming marginalized, its disapproval by the society and the realization, by the public authorities that the service provided was unable to protect and 'reintegrate' the children under their custody. The social control era, as opposed to social development, has ended. Some crucial reforms at State level were made and, in society a great number of associations and movements on the defense of children's rights (such as the already

⁶⁶ Brasil Crianca Urgente – the Law 8.069/90(Brazil Child Urgent), Instituto de Pedagogia Social, Columbus Cultural editora, Sao Paulo, Brazil, 1990 at 48.

mentioned *MNMMR*-National Movement of street boys and girls- founded in 1985) could be seen at the State level, *FUNABEM* was substituted by *FCBIA* (Brazilian Foundation Center for the Childhood and Adolescence) by the federal government empowered in 1990, according to the imposition of the new legislation, the ECA, which was recently substituted by *FIA* (Foundation for the Infancy and Adolescence), by the new government, elected in 1994.

In May, 31, 1990, the then President Collor announced to the nation that children would be the absolute priority of the government. In his official speech, President Collor said " We are in the image's era. The tragic picture of abandonment and marginalisation in which the our children live and die speaks for itself.(...) Brazil has around 65 million children, below the age of 19 years-old. Annually, 250 thousand children die before completing their first year; one of every 4 children suffer from malnutrition, which leads to irreversible mental deficiencies. 61% of children from 1 to 4 years-old live in domiciles without basic sanitation; in the northeast, the percentage is even higher at 85%. More than 4 million children from 7 to 14 years old are out of the classrooms; for every 100 children that enroll in primary school, only 18 complete the middle school."⁶⁷

The ECA was put in force in July, 1990. The new legal regime requires fundamental changes in the social policy towards children in the country to follow, according to it. In terms of its content, while the Minor's Code was based on the doctrine of irregular situation of the 'minor', the ECA is built on the doctrine of integral protection of the child and adolescent. From the corrective, punitive, limited and discriminatory

⁶⁷ Id at 12,13.

aspects of the Minors' Code, a move was made to a universal law that would apply to all, would not be discriminatory in its terms and would regulate all the aspects necessary for a child to have a full, complete, integral development until he or she completes 18 years or, in some special cases, 21 years.

In terms of the ECA method, this legal diploma 'emancipates' the children, by recognizing his or her fundamental rights, his or her peculiar condition of a person in a process of development and also as absolute priority of the families, of the society and of the State. The meaning of this 'emancipation' relies on the fact that the previous legislation treated children, and particularly or solely marginalized children as object of disciplinary intervention. The ECA aims to stop that conduct, by drawing a universal picture of a child: someone who has rights according to and despite its limitations due to his or her basic condition of as a person in a process of development. The discrimination era on the law is over. The absolute priority in terms of the fulfillment of his or her fundamental rights is also an extremely important innovation.

Another change is related to the administration of the state apparatus directed to children's rights. The political-administrative decentralization, meaning the federal government sharing power over decisions affecting children with the city governments is one of the innovations. The city government gained autonomy and rights and duties towards its children.

The second change is in the field of political participation of the people on the public policies devoted to children. According to the ECA and Constitution, no public policy towards children can be elaborated and enforced without the people's participation.

The creation of the Municipal Councils embodies this change. The Municipal Councils for the Protection of Children's Rights deliberate on public policies and control its enforcement. Half of its members are drawn from the government and half from the society. It is supposed to discuss and deliberate over public policies devoted to children. There are councils for the defense of the rights of the child and adolescent at the State and Federal levels.

There are fundamental aspects to be analyzed on the ECA. As observes Nogueira, the ECA is called by many specialists on children's rights, as the "letter of emancipation"⁶⁸ of the minor. Until now, the analysis over the exposed facts and theories has pointed to the importance of the ECA and the legal revolution it represents. There is also no doubt that the social segment most affected by the State's public policies dedicated to children's rights, are the impoverished children, understood as the ones towards who the State failed to fulfill its duties and obligations by providing the necessary conditions for the implementation his or her fundamental rights. The street children are included on that category.

Therefore, on analyzing the ECA I will basically limit myself to the fundamental rights provisions of this new legal regime and on the basic innovations it brings to the implementation of those rights.

⁶⁸ Nogueira, Paulo Lucio. "Estatuto da Crianca e do Adolescent Comentado: Lei n. 8.069, de 13 de julho de 1990.(Statute of the Child and Adolescent commented: law n. 8.069, July 13, 1990)"Editora Saraiva. Sao Paulo, Brasil. 1990 at IX.

IV - The Legal Protection of Street Children (Street Children under the ECA and the Int'l Children's Rights law).

1.Introduction

Although the phenomenon of street children, as described in the present work, had its origin in the 80's, it has been identified and registered in the related literature, the presence of children on the streets of the cities of Brazil, through the history, specially, since the slaves were emancipated in 1888. The incorporation of the slaves' hand labor was, then a challenge for all society and State. Although industrialization and urbanization were in progress, there remained a contingent that still couldn't be promptly assimilated. The public policy towards the incorporation of the recently emancipated citizens, was poor and, initially reduced to limited professional training." The compulsory education, necessary to the workers at industries was initially provided to natives, then to slaves, and to orphans and beggars."⁶⁹ The offspring of families who were not incorporated into the work market brought children to the streets.

The presence of children on the streets, still at the end of the nineteen century, became a concern to the authorities. Besides the general interest for the matters related to the children, " in the first decades of the century, the poor childhood in the country became the target of attention and care in the country - on the families, on the streets or on shelters, there is a consensus: the childhood is in danger. But there is the other side of

⁶⁹ Rizzini, Irma. *Assistencia a Infancia no Brasil: uma analise de sua construçao* (Assistance to Infancy in Brazil: an analysis of its formation).Ed. Universidade Santa Ursula, 1993 at 10.

the question, constantly remembered by medical and juridical fields; the childhood is potentially dangerous, since the extreme poverty conditions of parents prevents them from providing their children an adequate education, according to specialists, that is, the moral, institutional and professional education"⁷⁰. From that, it is possible to take some important conclusions.

The first one is that over the poor children there was an accumulation of discriminatory ideologies. Second, they were victimized by the lack of public policies. Third, the moral education given by their families was considered improper, only due to their material conditions.

Therefore, the children were considered dangerous. Doctors were concerned with the threat to public health and the danger they represented, since they lived in conditions of poor sanitation. The concern of Jurists relied on the potential involvement with criminality, due to their condemned moral education. According to Rizzini, " the medical and juridical fields attention to the childhood in the beginning of the century is intrinsically related to the project of standardizing the society, advocated by members of the intellectual and economic elite and by authorities in the country. What it was intended to eliminate were the social, physical and moral disorders, mainly in the urban centers."⁷¹

In such a context, the presence of children on the streets represented one of the major threats to the public order. Protection and correction was the policy directed to them. Rizzini reports that at the end of the last century, by an agreement between the

⁷⁰ Id. at 16

⁷¹ Id. at 19.

Chief Police and the Orphans' Judge, hundreds of seven years-old and older street boys would be sent to farms, in order "to be educated". Rizzini reports that this solution was amply publicized by the authorities. They advocated the idea that anything would be done to clean and to sanitize the streets and isolate the dangerous elements from the social conviviality, even by enslaving children. Besides other reasons that justify this specific solution, such as a need for farm workers, it is important to notice the rise of the culture that, until the present, discriminated and victimized poor children in Brazil. "The isolation of poor 'children' in 'common houses' was theoretically justified by the idea of moral preservation - of the children, but above all, of the society, that prevents itself against the rejected children, potential deviants."⁷²

The poor children were generally stigmatized. "Juridically, minority is defined by the age criteria(...). Although, we verify that the utilization of the notion of minor by the juridical literature, transcend the age criteria. This literature presents a concept of minor associated with 'moral abandonment', with criminality and with poverty."⁷³

The discrimination against street and marginalised children subsists. It can be felt everywhere. The phenomenon of street children and the violence they suffer speak by itself. There is an ideological barrier that ought to be surpassed. And the legislation is an important instrument for change. The Federal Constitution, the ECA and the Convention on the Rights of the Child are important tools for emancipating the children from a reality of negligence and discrimination.

⁷² Id. at 50

⁷³ Id. at 44.

2. ECA and Children's Rights International Law

It is now relevant to consider what rearrangements the ECA and the Convention on the Rights of the Child have brought to the universe of the rights of the children and what is its impact on the lives of street children. It is also important to analyze the resistance against the rupture that the ECA and the Convention bring, in the juridical and social culture that created the figure of the Minor.

According to Bicudo, " The so called street child is an island surrounded by omissions. All public policies have already failed to help him.(...) The only public policy that is systematically and continuously addressed to him is the Public Security Policy and this policy doesn't reflect his social interests but it reflects a commitment to the satisfaction of the interests of the society that marginalized him" ⁷⁴

Although the Minor's Code and the public policies directed to the minor were conceived under the effect of the Universal Declaration of the Rights of the Child, it didn't incorporate all the perspectives pointed to by the Declaration. Moreover, the declaration had no normative power since it was a charter of principles lacking in binding effect. Nevertheless, "compared to the Geneva Declaration, this Declaration is far more precise, and the earlier content and principles have been considerably widened.(...)The Geneva Convention still regards children merely as objects of the law: '... the child must be given'... " ⁷⁵. The UN Declaration on the Rights of the Child departs from this viewpoint and takes the first steps towards the recognition of children as legal subjects

⁷⁴ Id. at 84

⁷⁵Verhellen, Eugen. Convention on the Rights of the Child; background, motivation, strategies, main themes Leuven/Apeldoorn Garant. 1st edition. 1994, at 60, 61.

(people with their own rights).”⁷⁶

The recognition of the direct applicability of international covenants by the 1988 Constitution was the first step towards the opening of the national juridical order to international standards of children’s rights. The ratification of the Convention by Brazil in November 21, 1990 (Decree no. 99.710) and the promulgation of the ECA in July, 1990 were the next steps.

By February, 1996, the Convention was already ratified by 193 States. The incorporation of the Convention perspectives into the national Constitution and legislation have been achieved in Brazil. In fact, the chronological order is inverse in the Brazilian case since the Constitution and ECA were promulgated before the Convention was put in force. The chronology though seems to be of less important value in the present case. As pointed out above, discussions over the theme of children’s rights were taken place everywhere, at the national and international levels, until the stage when they began to be assimilated was reached. By 1996, of 43 States whose reports were submitted,

14 have incorporated the Convention into the Constitutions; and 35 of 43 had passed new laws or amended existing laws to conform with the Convention. According to UNICEF’s point of view, the convention “works by bringing changes in laws, institutions, attitudes and, eventually in ethos, policies and practices.”⁷⁷ Brazil can be a good example since the Constitution and the ECA reflects the discussions that for so many years took place before

a consensus was achieved and the Convention ratified.

⁷⁶ Id.

⁷⁷ UNICEF, supra note 3.

Still, Pereira rightly points out that " the 1988 Constitution and the Statute reveal three fundamental elements that give a new direction to the protection of childhood and adolescence. As subjects of rights, children and adolescents are no longer treated as passive objects of rights , turning to be, as adults, subjects of Fundamental Rights."⁷⁸ And still, they have special rights due to the fact that, basically, they are not acquainted with their rights and they have no means to defend and satisfy their rights by themselves.

The present analysis will examine the ECA provisions and the Covenant on the Rights of the Child provisions, as applied to the reality of street children. A focus on the fundamental rights of the children and adolescent found in the ECA will be done and a parallel to the substantive rights provisions of the Convention will be made. The application of both documents to the universe of street children will be analyzed.

As an introduction, it is important to comment on the ECA preliminary provisions, that can be compared with the preamble of the Convention, since it defines the general principles under which the whole law should be interpreted.

Preliminary provisions

Art. 1st. This law regulates the integral protection to the child and the adolescent.

The doctrine of integral protection of the children is formally expressed as a basic principle that will govern the ECA. Accordingly, children and adolescents are subjected to

⁷⁸ Silva Pereira, supra note 54 at 28.

the protection of their rights, in terms of universality and in all its facets. The street children are among the victims of a long term, historically rooted process of marginalization in Brazilian society. The term marginalized here means excluded from the benefit of the satisfaction of fundamental rights, as described below, in the transcript of the ECA fundamental rights provisions.

The recognition of this doctrine represents a revolution in the legal terms. It overcame a past when the impoverished children were treated under a separate legislation.

The Minors' Code, directed to the minor in irregular situation, provided the protection, assistance and vigilance of the minors, as it was displayed in its first Article.

The former legislation in fact, contained a discriminatory and punitive sense. It was directed towards children who would otherwise disturb the social order by remaining in the streets and by infringing the law as they were not satisfactorily protected by their families and communities.

The most important innovation brought by the ECA is the recognition the fundamental rights of the children, independent of their familiar, social or economic *status*. When reflecting over the role played by the legislation over the problem of street children, a tendency to think of the creation of a special legislation comes out. And I am sure that there is room for a variety of public policies dedicated to street children, that depend on special legislation. The Statute though, is already a special legislation, originated from constitutional provisions. And, still, it can be applied to any children, including children with special needs. Where action is more necessary.

The enforcement of street children's rights in Brazil, now, does not now depend on the

creation of a new law. The doctrine of integral protection, though, has to be assimilated by the State, by the family, by the society, by the community and by the children themselves, as a new mentality, recognizing their rights to freedom, respect and dignity.

The Minor's mentality is still active. The integral protection is still far from being fully accepted. Brazil is still a country where the respect for the rule of law is not imperative, in practice. One simple example can illustrate the present assertion.

The State of Rio de Janeiro offered a course for the public servants in charge of the education and vigilance of children located in state shelters only in 1997, that is, seven years after the promulgation of the ECA. It was the first time they were trained according to the norms of the ECA which was substantially different from the former legislation.

As they reported, the only change in their routine, since the promulgation of the ECA, is reflected in their professional *status*. Some of them received the title of educational agents with the ECA, instead of security vigilantes, as it used to be during the Minors' Code. The 'educators' still expressed their opposition to the statute. They say that the legislation is idealistic and that they have no means or authority to implement it. All the cases and examples narrated by them during the training sections are relevant and elucidative of the present analysis and context. The reason why a child is kept in a shelter may vary, but, indistinctly, there must be a legal basis. What happens, in fact, is that the will of the authority is the law, or is superior than the law. The authority, in this case, is the executive, city or state. According to the governmental policy they are

allowed

or not to follow the law, to act according to their duties. Explicitly, some shelters can be full, during a particular government, and empty, during others, whose order is to let the children to flee/escape. The number of children subjected to state custody doesn't depend on the number of children that, according to the law, should be submitted to State custody, that is, on the intensification or mitigation of a social problem. It seems to depend on the authority's will and way to apparently solve the problem.

In this context, it is not surprising that the 'educators' were trained to do their jobs, according to their new duties, created by the statute, seven years after the law was put in force. They have no autonomy and their duty is defined by the authority, not always based on the law.

Furthermore, the second most important point in the first article is the distinction between the child and the adolescent. The distinction doesn't exist on the Convention on the Rights of the Child, as it will be discussed below. And it has crucial importance to the evolution of the concepts belonging to the universe of children's rights, with special implications on the lives of street children.

(ECA)

Art. 2nd. For the purpose of the present law a child means every human being below the age of 12 years, incomplete, and an adolescent means the human being below the age of 18 years, incomplete.

The most relevant implication of the above provision on the lives of street children

is the definition of a specific age for the beginning of criminal liability. According to the

ECA, the adolescent can be submitted to trial, in the Juvenile's Court. The maximum punishment is to place the teenager in a state boarding-school, for a maximum period of 3 years.

Albergaria's opinion is that " the distinction made by Art. 2nd doesn't follow the biological distinction between a child and an adolescent. It also doesn't agree with the legal regime found in the comparable legislation.(...)The distinction has great importance. The childhood is the decisive period when the human person develops. The socialization that starts in the childhood continues during the adolescence towards the acquisition of a moral conscience.”⁷⁹

The classification contained in Art. 2 carries a subtle intention to regulate criminal liability. The distinction doesn't cause any effect on the regulation on political rights. The adolescent is able to vote upon attaining the age of 16. It also doesn't cause any effect on the prohibition to work. The adolescent is denied the right to work before he or she is 14 year-old. Similarly, the adolescent, according to the letter of the statute, cannot drive. The adolescent cannot travel abroad without both parents' authorization.

Therefore, there is not an uniform definition, implied by the legislation, about the concept of adolescence. Is it biological, psychological, moral, physical or ideological? There is no solid base for the multiple conceptions implied by the legislation about adolescence. I wouldn't play an easy evaluative game, by interpreting the prohibitions and allowances created by the ECA. But, still, it doesn't seem coherent to allow the teenager to vote and not to drive or to leave the country, without the parents permission.

⁷⁹ Abergaria, Jason. "Comentários ao Estatuto da Criança e do Adolescente". Aide Editora e Comercio de Livros LTDA. 1991, 2nd edition. Rio de Janeiro, Brasil at 24.

The contradictory legal provisions about the adolescent responsibility cause endless debates in the country, around the State and the society. In Parliament particularly, the discussions over the responsibility of the juvenile is constant. Among them, I will strike the discussions over the criminal responsibility of the adolescent.

The ECA allows the adolescent to respond for his/her criminal deeds. It means that, as mentioned above, the adolescent can be arrested, appear before the Judge and sit in Courts at the Juvenile “tribunals” in the country. The application of a punishment respects the spirit of the Constitutional and the ECA provisions, according to which the family responsibility on the prevention of future infringements of the law by the adolescent should be reinforced. The restraining of freedom, that is ‘imprisonment’ cannot also exceed 3 years, what is only applied under extreme conditions. It reflects the principle of brevity, found on the ECA and on the Convention on the Rights of the Child.

The ECA doesn’t create special crime definitions. But the ECA adopts different terminology when mentions the crimes committed by adolescents and also the types of punishment addressed to them. For instance a crime committed by an adolescent is called ‘*ato infracional*’, (infringement act). The penalties are called ‘*medida socio-educativa*’ (social-educational measure) and so on. When restrained in his or her freedom, the adolescent may live in a State shelter, where he or she should have access to education. They are not imprisoned, that is, they don’t sleep in cells, but in regular collective rooms. They have to be offered professional training courses and have sportive and artistic activities, according to the law.

It is doubtful whether all these activities are implemented. In a visit to the School

Joao Luis Alves, a state boarding-school where boys are placed I was taken to classrooms and informed about the recent donations of computers to the school, so that the boys could be trained computer skills. I was also told about the inadequacy of the training since many of the children can hardly read. Besides, complaints of physical violence are common. Rebellions are constant. For instance, my visit was provoked by a complaint made by a mother of one boy placed at the school. She reported to the NGO I worked at, *Projeto Legal – Human Rights Legal Defense Center* – that her son had a leg broken at the shelter. In my visit to the school, I was denied access to the boy, even though I had a formal mandate.

Despite the irregularities, the ECA guarantees a special protection towards the adolescent who commits an infringement of the law. The system is considered by many an unnecessary privilege. Indeed, there are more than one law draft in the Parliament, at the National Congress, to reduce the age of 18 to 16 for full criminal liability.

The children who get involved with commitment of crimes come from working-class, impoverished families. And, most of the crimes are light, or, of reduced and low impact or rate of violence. The street children, for example, from my experimental point of view, but also according to NGO's reports, typically get involved with petty theft, such as shop robbery and peasants stealing. At the shops' the kids steal food, most of the time. The constant stealing of shops motivated, not ignoring other reasons, the formation of the death squads. Death Squads, as said before, don't target only street children, but also youngsters and young adults from surrounding neighborhoods, with no criminal records.

Anyhow, the impact of the criminal responsibility on street children is different, compared with other children who have stronger family references and who live in a safe area, protected by police forces, not attacked by them. According to the spirit and ECA provisions, the judge tends to recall the children's families responsibility on correcting the deviant conduct of the children who committed a crime, when applying the penalty. In the case of street children, it is not always possible.

Nogueira⁸⁰ is one of the advocates of the reduction of criminal majority to 16 years-old although, he opposes strong arguments to the art. 2 classification and, particularly, its impact on the criminal responsibility of the children. He considers the individual at 12 years-old immature, being still a child and hence too vulnerable and yet not prepared to sit in Courts and be prosecuted, as an adult, even considering that it all happens in a separate jurisdiction, the Juvenile Courts. According to the Beijing rules:

Principle 4.1. "In these juridical systems that recognize the concept of criminal liability of minors, its beginning should not be placed at an excessively early age, considering the circumstances that follow the emotional, mental and intellectual maturity".

Still, according to the Art. 1st of the Covenant on the Rights of the Child,

Art. 1 . For the purpose of the present Convention a child means every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier.

The distinction created by the ECA doesn't seem to be in conformity with international legal standards. Considering, as it was above exposed, that the distinction

⁸⁰ See Nogueira, *supra* note 66 at 9,10.

has

only effect on the evaluation of criminal responsibility, the marginalised and street children

are directly affected. It seems to be a way found by the legislator, to use the law for social control, as it used to be in old times.

(ECA)

Art. 3rd. The child and the adolescent enjoy all the fundamental rights inherent to the person, with no loss of the integral protection that this law refers to, assuring, through the law, or through other means, all the opportunities and facilities, so that to facilitate his or her physical, mental, moral, spiritual and social development, in conditions of freedom and dignity.

This article, followed by art. 4 is a synthesis of the fundamental rights of the child. Art. 3rd is based on the second principle of the International Covenant on the Rights of the Child and on the Brazilian Federal Constitution.

Art. 27. 1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual and social development.

Both provisions seem to determine the content of the integral protection doctrine. The development of the child has to be full, encompassing moral, spiritual, mental, physical and social aspects.

The right to development of the children and the adolescent, according to the ECA, is the supreme right of the children and adolescents.

The right to complete development should be implemented under conditions of freedom and dignity.

The word freedom, in this article, can be interpreted as the right to freely develop,

free from impositions of any pattern of physical, moral, spiritual and social development, according to art. 15, 16, 106, 110 and 125 of the ECA, discussed below. It also seems to be the right to be respected on his or her own pace of development, according to his or her choices, possibilities or opportunities. At the same time, it is the right to have the opportunity to free and complete development. It is, thus, the right not to be denied the right of individual complete development.

Using Erick Fromm's definition "the victory of freedom will only be feasible if democracy evolves into a society in which the individual won't be subordinated nor manipulated by any outside forces, that is the State or the economic machinery; finally, a society in which the conscience and the ideals of the men won't really be his and express the objectives deriving from the peculiarity of his own self."⁸¹

Dignity is another important aspect that has to be an essential condition for the implementation of the fundamental rights of the child, defined by the right to full development and embodied by art. 15, 18 and 19 of the ECA. Liberty and dignity are conditions *si ne qua non* for the implementation of the right to individual development.

Silva explains that "dignity of the human being is a supreme value that attracts the content

of all the fundamental rights"⁸² The dignity of the person is, according to the 1988 Federal

Constitution, one of the fundamentals of the republic of Brazil. The Art. 1st, III of the Federal Constitution stipulates the dignity of the human being as one of the fundamentals of the Brazilian Democratic State of Law. "It is the first time that a

⁸¹ See Silva Pereira, Tania da, supra note 55 at 75,76.

⁸² Id. at 79.

Constitution institutes, specifically, objectives of the Brazilian State, not all, what would be unreasonable, but the fundamental ones, and among them, the ones that can be considered as a base for positive installments towards the implementation of an economic, social and cultural democracy, aiming to attain, in practice, the dignity of the human being”⁸³

The ECA incorporates the perspective of the Constitution, in which the value of dignity is first mentioned. It can also be interpreted as a complement to the concept of freedom. According to Silva, “ The human life isn’t only an assemblage of material elements. Moral and immaterial elements integrate it. The individual moral is the synthesis of the person’s honor, the good-name, the good-fame, the reputation that integrates the human life as an immaterial dimension. The human life and its components are attributes without which the person would be reduced to an animal condition of little significance. Hence, the respect of the moral integrity of the individual assumes the character of a fundamental right.”⁸⁴

Still, the Universal Declaration of the Rights of the Child, in article 9 classifies as offenses to the dignity of the child the abandonment, cruelty, exploitation, slavery, and all forms of work or occupation that damages her or his health, education or physical, moral or mental development.

The street children are not reached by the right to develop in conditions of liberty and dignity.

⁸³ Silva, Jose Afonso da. “ Curso de Direito Constitucional Positivo (Positive Constitutional Law Course) ” Sao Paulo, Brasil, Malheiros, 1993 at 93.

⁸⁴ Id. at 184.

(ECA)

Art. 4th. The family, the community, the society in general and the Public

Comentado [MG1]:

Power have the duty to secure, with absolute priority, the implementation of the right to life, to health, to food, to education, to sports, to leisure, to professional training , to culture, to dignity, to respect, to freedom and to living among a family and community.

Only Paragraph: The guarantee of priority comprehends:

- a) priority to receive protection and help in any circumstances;*
- b) precedence to be attended by the public services;*
- c) preference in the formulation and execution of social public policies;*
- d) privilege on the destination of public resources in areas related to the protection of the children and adolescence.*

The present provision specifies the fundamental rights of the children and adolescents that are contemplated within the right to development.

The Second important point in the present article is the nomination of the persons in charge of the implementation of the rights of the children. This provision finds a parallel in the International Covenant on the rights of the child:

Art. 5. States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by the local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

The responsibility over the implementation of the rights of the child is extended

to other actors, besides the State, such as the parents, the society and the community.

Everyone is in charge of respecting the rights of children.

The guarantee of priority in the respect and implementation of the rights of the child is another important clause found in this article. The priority, as it is defined in this provision, is only directly binding on the State. The priority evokes a special right to which

children are entitled. And the State is the actor responsible for providing special protection

to the children, as defined in this provision. In the CRC parallel provision may be found:

Art. 3. 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authority or legislative bodies, the best interests of the child shall be a primary consideration.

The entitlement of special rights to the children is based, as pointed out by Albergaria on a principle of humanity that itself is reasoned on the social solidarity, above all, for the most vulnerable ones. The Constitution and the ECA, enforced by international law, enforce the social and generalized responsibility towards the children, who are always vulnerable and have special rights, besides and among the right to integral protection for their full development.

The implications of the shared responsibility over the children and adolescent are relevant specially for street and marginalized children. Once, according with the Minor's Code and past legislation, the State protection over impoverished children was exclusive. There were cases when poverty was a reason for the loss of custody, by the children's families over the children.

So much so the ECA states at Art. 23:

Art. 23. The lack or reduced material resources doesn't constitute sufficient motivation for the loss or suspension of the parents right over the children and adolescents.

Even after the promulgation of the ECA, some cases were still decided, according to the past philosophy. The relevance of the present statement relies on a basic principle that brings the right to being treated in standards of equality to all children, by the State, by the society and by the families.

Art.6th. In the interpretation of this law, the social goals it aims to achieve will be considered, as well as the common being, the individual and collective rights and duties of the children and adolescent, as persons in peculiar condition of development.

According to this provision, the interpretation of the ECA shouldn't be limited to a

Decision by any of one judge. The law is not merely punitive or corrective, as it discussed Above. It intends to abridge the integral protection of the rights of the children. In that sense, Judiciary, Legislative and executive powers have to work together with society, so that the integral protection of the rights of the children will be implemented. If the Supreme law of the country, the Constitution is designed under the principle of social justice, that should be the meaning of social goals to be achieved by the ECA. The well-being, as well, can only be achieved under those circumstances.

Therefore, this provision is the front door of many changes that have been taking place since the ECA was promulgated. Later provisions in the ECA regulate the inter-disciplinary character of the integral protection as designed by this law. The Minors'

Code, contrarily, in art. 131 stated:

Art. 131. "The authority protective of the minors can emit any provisions, according to its prudent arbitrary, convenient analysis to assure their protection and assistance, being subjected to responsibility for abuse of power".

The ECA distributed the responsibility over the protection of children's rights to the society. It is more than a statute or a code. It is an expression of a new conception of children's rights. It is the design of the regulation for the children's rights policies in Brazil.

Fundamental Rights

The present analysis will be limited to the fundamental rights provisions of the Statute, which will be compared with civil, political, economical, social and cultural rights found in the Convention on the Rights of the Child, that defines, from article 1 to article 41, the rights of the child and the obligations of State Parties ratifying the convention. In conformity with the 2nd paragraph, Article 5th of the Federal Constitution, a new classification of the fundamental rights is presented. According to it, these rights are organized in three distinct groups; a) the rights expressed in the letter of the Constitution(...); b) the rights expressed in international treaties to which Brazil is a party; and finally c) the implicit rights".⁸⁵

Moreover, the direct application of the human rights treaties ratified by Brazil are an important legal innovation and, still, a plus, on the implementation of the rights of the

⁸⁵ See Piovesan supra note 42 at 317, 318.

children in Brazil. Indeed, the implementation of the rights of the children has been gradual. The new legal standards have been progressively assimilated by everyone. There are not legal barriers for the assimilation of the international human rights law in the national legal system. And yet, the rights created by international human rights law have special protection under the Constitution. These rights can't be abolished, through amendments to the Constitution. And they can complement the legal system, by introducing rights not previously existent.

The Right to Life

(ECA)

Art. 7th. The children and the adolescent have the right to protection of his or her life, health, through the implementation of public social policies that secure birth and the healthy and harmonious development, in reasonable conditions of existence.

(Convention)

Art. 6. 1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

One important aspect of these provisions is the responsibility of the State to guarantee the respect for the physical integrity of the child and adolescent. In the universe of street children, this is quite a problematic topic. Police violence is part of the routine of street children. Besides, the life in the streets, obviously, is not healthy, that is, has no quality for one in a stage of development.

(ECA)

Art. 5th. No children or adolescent will be the object of any form of negligence, discrimination, exploitation, violence, cruelty and oppression(...).

The present provision finds a parallel on the International Covenant on the Rights of the Child, in its following article.

Interpreting both provisions, that are complementary, leads to the State responsibility to prevent children from violence and cruelty and also to assure the implementation of their fundamental rights. It is stated that the State is the guardian of the rights of the children. The implementation of all the fundamental rights depends on life, that is on the implementation of the right to life and health. Cruelty, discrimination and State negligence and omission are the basic elements that create conditions for the harassment and killing of street children in the country.

The determination of the State responsibility on preventing violence and cruelty is clear. In that case, there are important measures to be taken by the State, in Brazil, towards street children. Street children are greatly affected by cruelty and by violence. And yet, the State still doesn't take enough steps to prevent that situation.

The right to life and health of the child and adolescent depends on public social policies. And, in the case of street children, even more than that. The respect for the right to life and health of children that live in the streets depends on a variety of measures to be taken which have not yet taken. First, a mentality that sees the street children as an imminent danger still exists. This mentality is responsible for the assaults against the physical integrity of street children. The police repression against street children is one example. Instead of defending them and helping them, the police violates the moral and

physical integrity of street children.

The *Candelaria* case above described is an example. After *Candelaria*, despite all the evidence put in this gross human rights violation case by local and international organizations, street children continue to be murdered and threatened. Two years after *Candelaria* case, street children of *Lapa*, a neighborhood in downtown Rio de Janeiro city are seriously and constantly threatened by local policemen. They reported to a local NGO, a human rights defense center, their fear caused by the threats. Incidents of police violence against street children are numerous and happen all over the city. Moreover, policemen are frequently members of death squads.

The policy of eliminating the danger, represented by workers classes, by inhabitants of low-income communities and by the population that live on the streets is still a policy of social control. Faleiros reports that a document of a military organization (ESG –*Escola Superior de Guerra*) produced a document called “1900-2000 – the vital decade for the modern Brazil“ (1989) strategically elaborated by the military intelligentsia, stated that the army could intervene to neutralize and even destroy the hordes of bandits that the street children could become in the future. Although this report wasn’t officially recognized by the military chief in charge of that organization, some other members assumed that it was valid.

The police behavior towards street children, that is, the policy of oppressing them, may be of direct State responsibility and initiative. The above mentioned document is

an example. Different city executive governments in Rio de Janeiro attempted to prohibit the street children to remain in the streets and to force them to live in shelters, against their will. Under the protest of local organizations and human rights defense centers, the Judiciary has declared, on more than one occasion, the nullity of the mayor's decision, based on the ECA. This is another example. But the involvement of policemen in death squads and the policemen behavior towards the children is not demanded or controlled by the government.

According to Faleiros' analysis, the "Public order is controlled by private violence."⁸⁶ The social chaos produces a second social order, parallel to the State, where everyone is using any means to survive, without state protection. Lack of public policies and impunity feeds this engine. And, moreover, street children are victims of social-economical process that brought them to the margins of the society. A preventive measure that needs to be carried on by the State is for sure to adapt a model of social-economic development that creates conditions for permanent well-being of human kind, giving also protection to the vulnerable social groups in society. Today, though, there are no official campaigns to warn the population about death squads, police harassment or State programs to strike discrimination. Street children in particular are ignored. Physical integrity also comprehends health. The streets are not a healthy environment. In that sense, the solution depends on an overall improvement of the country's economic, social and political situation. Reducing the number of abandoned families is a long-term solution. A short-term measure should stress the discrimination that is on the basis of any

⁸⁶ Faleiros, Vicente de Paula, "Violencia e Barbarie(Violence and Barbarism)" in Rizzini, Irene (ed.))A Crianca no Brazil Hoje 175 (1993).

attack of the right to life of street children. The implementation of the law is one important key to solve the problem. But, still, not the only one.

Freedom, Respect, Dignity

(ECA)

Art. 15th. The children and the adolescent have the right to freedom, respect and dignity as human beings in process of development and subjects of civil, human and social rights, guaranteed in the constitution and in the legislation.

The legislation, that is, the ECA defines which are the rights belonging to the concepts of freedom, respect and dignity, as will be pointed below. The entitlement of human rights to the children and adolescents, though, still guide the interpretation of all the statute's provisions for any breaches that can possibly found in this legislation.

Freedom

(ECA)

Art. 16th. The right to freedom comprehend the following aspects:

I- to go, to come and to remain in the public spots, areas and community areas, excluding the legal constraints;

II- opinion and expression;

III- creed and religion cult;

IV- to play, to practice sports and to recreation;

V- to participate in the family and community life, with no discrimination;

VI- to participate in the political life, according to the law;

VII- to seek refuge, assistance and orientation.

Art. 106. No adolescent will be deprived of his or her freedom, except em ‘flagrante delicto’ of infringement of the penal law or by written and reasoned order by the competent Judiciary authority.

Art. 110 - No adolescent will be deprived of his or her liberty without due process of law.

(Convention)

Art. 37.(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time.

(ECA)

Art. 125 - It is a duty of the State to care for the physical and mental integrity of the adolescents under custody. The State should adopt the adequate measures of contention and safety.

(Convention)

Art.37. (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority and to a prompt decision on any such action.

Art. 11. 1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Art. 12. 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

Art. 13. 1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

Art. 14. 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

3. Freedom to manifest one's religion or beliefs may be subjected only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

The ECA is a very comprehensive legislation. Under the topic of liberty/freedom, it covers all the points enunciated in the Convention on the Rights of the Child, in terms of the recognition of these rights, as civil and political rights. The ECA doesn't contain programmatic norms, but norms to be directly enforceable. The primary responsibility of the State to implement these rights is affirmed by the Convention.

Some of these rights have a particular meaning in the universe of street children.

The right to remain in the public spots and areas has been a matter of controversy. In the

history of Brazil, as previously described, impoverished children have been victims of discrimination, by the society and by the State. There was never a policy of compensation

towards the excluded or underprivileged. As exposed, the vulnerable groups in society, such as the poor children have been targeted by a policy of correction. The policy of cleaning, characterized by the forced retirement of the children that are found on the streets are part of the old paradigm, when children were regarded as objects instead of subjects of rights.

The solution given by the State, so far, for the problem of street children, have consisted in attempts to remove them from the streets and lodge them at State shelters. According to the ECA and the Convention, his removal can not be forced. Voluntarily, street children don't live in state shelters. Because of many reasons, the shelters are not attractive. First of all, it can be pointed that the children have family and/or friends at the streets. They don't want to be separated from each other. Secondly, some shelters are far away from where the children have a reference of family or friends, who they visit or count for any help or assistance. Still, in the streets they can work and receive the assistance of peasants, non-governmental organizations and other associations.

Comparatively, the State shelters may provide a safer and healthier environment, than at the streets. But children living at State shelters are not given integral assistance, according to their stage of maturity, special or even basic needs such as proper healthy food, education, recreation activities etc. Frequently, the children avoid shelters because they have no life at the shelters: they are retired from the streets and abandoned at the shelters.

On that aspect, the ECA is far from being implemented. A successful project run by a NGO in Rio de Janeiro - *Projeto Ex-Cola* - is facing the challenge of lodging street

children in apartment buildings. The NGO rented initially two apartments in Rio City, for boys and girls separately. A group of five people, among them psychologists and social workers helped them to adjust into their new life, such as teaching them how to cook, how to take care of their health, how to create and maintain a healthy environment, to prevent conception and so on. It is also required for living in the apartments that they find a job and/or study/and/or are receiving any professional training. So far it has been working well, which proves that the street children only want to remain in the streets if there is no better option, and that this should be respected. Therefore, it seems that the State is not implementing the right of all children to receive assistance and orientation, according to art. 125 of the ECA and to the Convention.

The right to remain in the streets is also protected by Art. 106 and Art. 110, mentioning the only case when the children should be forcibly removed from the public sites where they can be found. The legal constrains mentioned by Art.16 can, therefore, be interpreted as a consequence of a penalty for the infringing the penal law, respecting the due process of law. The Convention also enforces that rule, on the above cited art. 37. Although, there have been cases of acts of law prohibiting children to remain in the streets, which have been annulled and cases of illegal forced retirement of children from the streets, that have remained out of control, since perpetrated by the State, through the city or State police, under the executive and legislative power orders.

The right to political participation is also out of the reach of street children, and among the mentioned provisions, it deserves special consideration. Many of the street

children are not registered, that is, have no official records. Therefore, they are not allowed to vote. They can't also be registered as employees, which frequently constitutes a real problem, because it is already difficult for them to find a job and specially after they complete 18 years-old. After that anyone who is not registered and wants to do so, has to file a law suit, in order to prove to the judicial authority that he or she are not yet registered (this is to prevent obtaining two registrations). This process can take a long time and, by the end of it, the person may have lost his or her job opportunity. The State apparatus is not prepared to facilitate this process. And, in the first place, the State has the responsibility to keep records of all citizens, indiscriminately. It is another aspect of State discrimination and negligence towards street children.

The final topic that seems relevant from the innovations brought by the ECA and the Convention to the universe of street children, is the right to assistance and orientation. This specific right has support in the ECA provision – art.131 to 135 – that creates the Special Guardianship Councils that specially targets children at-risk.

The Special Guardianship Councils have been established all over the country. The members of the council are elected by the community and have a permanent staff of social workers, psychologists, educators and other professionals. The councils are expected to enforce the ECA by assisting and orienting the children whose rights have been threatened or violated, by orienting parents or others responsible for the children, by requiring the authorities to implement public services and policies, by monitoring the implementation of the statute etc. The Councils constitute an important device for the

enforcement of the ECA and specially, for street children.

The Special Guardianship Councils have been created in Rio de Janeiro City in 1995, that is, 5 years after the promulgation of the ECA, despite the efforts made by the children's rights movement in the city. Still, the electoral process of the members of the councils wasn't fair. Many irregularities happened. Therefore, a number of elected members for a period of three years had other interests diverse from enforcing the implementation of the ECA.

But, still, some Councils have been established and have been making a difference on the implementation of the ECA. It is still early to condemn the structure of the council. Some NGOs have been legal training the members of the councils on the ECA in Rio de Janeiro, putting efforts to make the Special Guardianship Councils serve its objectives. By 1996, around 1.000 municipalities have created Special Guardianship Councils in the Rio de Janeiro State that congregates 5.000 municipalities.

Respect

(ECA)

Art. 17 - The right to respect consists on the inviolability of the physical, psychic and moral integrity of the child and the adolescent, abridging the preservation of the image, the identity, the autonomy, the values, the ideas and creeds, the spots and personal belongings.

Art 16. 1. No child shall be subjected to arbitrary or unlawful interference with his on her privacy, family, home or correspondence, nor to unlawful attacks on his or her honor and reputation.

2. *The child has the right to the protection of the law against such interference or attacks.*

Street children have their right to respect systematically violated. They are deprived from enjoying basic rights that are necessary for the maintenance of their integrity. Moreover, they suffer extra attacks while on the streets. They are targeted by all sorts of physical and moral violence. Murder, general physical damages, constant threats, sexual harassment, prostitution etc. The physical violence has a strong negative moral effect on the children.

The disrespect for the right to image of street children, for instance, is illustrative of a culture that sees them as objects, as criminals, as deviants. Documentaries on television showing street children are common. Their image, explicitly or implicitly is constantly associated with criminality, drugs, prostitution. Their identities (names) are protected, according to the ECA. But, still, their faces are poorly covered or even not covered at all. And it is common that they were not aware of how their image would be exposed or that they were not asked for an authorization to anyone to use their image.

Therefore, they from suffer serious implications on their lives, from the use of their images. While working at *Projeto Legal* (Human Rights Legal Defense Center), an NGO in Rio, I received many complaints from street children found in this situation. One complaint departed from a street boy that was told that he was going to be filmed for a documentary about Rap music. At the end, his image appeared in a documentary about marginalised children, associating it to criminality. At the time Lucas was filmed, he was receiving professional training at a NGO (*Associacao Sao Martinho*) in Rio.

He was very disappointed by the association of his image with criminality because it was already a great effort for him to leave the streets and to try to believe and invest on himself by participating on the professional training at *Sao Martinho*. This episode had a negative effect on him, that ended up going back to the streets and leaving the NGO.

Projeto Legal took the case to Courts, in order to prove that the TV station infringed the law. The Prosecutors and Judge's first opinion was that there were no unlawful act, since the name of the boy wasn't mentioned. The judge though wanted to listen Lucas, that is the victim. But since Lucas was already out of reach, the case was dismissed. There are many other cases of the same nature, such as one girl that was filmed as a prostitute and was expelled from her house by her family etc. I am using Lucas' example to evidence the

human dimension of the street children that is still disregarded by the society and that even

the Judiciary still impose restrictions on fully recognizing the rights of street children, without discrimination of any sort.

Although it has to be registered that the resistance is less apparent in the decisions of the Rio de Janeiro Infancy and Juvenile's Court. Justice Darlan has been very active and

loyal to the letter of the ECA, what is more an exception than a rule in the Judiciary's *corpus*. The Judiciary is still very conservative. Because of his decisions, based on the principles of the ECA, he was accused of contributing for the increase of violence in Rio de Janeiro, more than once, and hence was submitted to inquires at the Rio de Janeiro Council of Magistracy.

Dignity

(ECA)

Art. 18. It is the duty of all to care for the dignity of the child and adolescent, saving them of any inhuman, violent, terrifying, shameful or constraining treatment.

Art. 19th. Every child or adolescent have the right to be raised and educated by his or her family and, exceptionally, in a foster family, assuring the right of the child and adolescent to share a family and community free of person that are addicted to narcotics.

(Convention)

Art. 19. 1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Education

(ECA)

Art. 53. The child and the adolescent have the right to education, aiming their full, complete development as a person in order to be prepared to exercise their citizenship and to be qualified for work, being guaranteed:

I - equality of conditions for the access and permanence in school;

II - right to be respected by their educators;

III - right to contest evaluative criteria, being able to appeal to the superior school

instances;

IV - right to organize and participate in students entities;

V - access to public and free school near their residence;

Art. 54. It is the duty of the State to secure to the children and adolescent:

I - fundamental, compulsory and free education, including to the ones that could have access to it at a proper age;

VII – assistance in the fundamental education, through supplementary programs for the purchase of educational materials, for transport, food and health care.

§ 1st - The access to compulsory and free education is a subjective public right.

§ 2nd - The non offering of the compulsory education by the public power or its irregular offering causes the responsibility of the competent authority.

Convention

Art.28.1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) make primary education compulsory and available free to all;

(b) encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) make higher education accessible to all on the basis of capacity by every appropriate means;

(d) make educational and vocational information and guidance available and accessible

to all children;

(e) take measures to encourage regular attendance at schools and the reduction of drop-out rates.

Art. 29. 1. States Parties agree that the education of the child shall be directed to:

(a) the development of the child's personality, talents and mental and physical abilities to their fullest potential;

(c) the development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(e) the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country from which he or she may originate, and for civilizations different from his or her own;

(h) the preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(k) the development of respect for the natural environment.

The right to education is, such as other economic and social rights, based on the right of the individual to be part of the civil life, on the extent to what the State can offer the individual. The right to education is essential for the fulfillment of all the other rights of the children, that should be satisfied as a condition of the fulfillment of the right to integral development.

The UNICEF Progress of Nations Report 1996 introduced the concept of NPG – National Performance Gaps, which is the difference between the actual and the expected

rates of development in a country. It is presented as one measure of the extent to which positive children rights are being honored in relation to the available resources, as measured by the GNP *per capita*. In the field of education the NPG rates for Brazil are⁸⁷:

GNP <i>per capita</i> / % of children that reached grade 5			
1994	<i>actual</i>	<i>expected</i>	<i>difference</i>
3.370	70	87	-17(NPG)

The right to basic education is a positive right in the sense that it is one of the most important investments in economic growth and in development. According to Partha Dasgupta, who comments in this report, there are evidences that increases in nutrition and health status are associated with increases in productivity and improvements in formal education. Lower rates of child mortality, improvements in child growth, nutrition, higher health facilities usage rates, high rates of contraceptive use, later age at marriage, falling fertility and lower rates of maternal mortality are some of the examples.

Reproducing Dasgupta's statement " A need becomes a right when a society becomes capable of meeting that need and when fulfillment of the need becomes essential to human flourishing or well-being (or when its lack leads to ill-being or destitution) and at the present time, only the State can guarantee such rights."⁸⁸

In the beginning of the 90's, Brazil had around 33 million of illiterate, and among them, 5,5 millions children, between 7 and 14 years-old. And still, only 13% percent of the

children would finish primary school. From the 142 million children who were born in

1990, 55% would finish primary school and 32% would finish secondary school.

⁸⁷ UNICEF, The State of the World's Children 1996.

⁸⁸ Id.

Simultaneously, according to Chaves, “ the federal government didn’t spend the minimum required by the Federal Constitution on fundamental education in 1990(...) It should have reserved to the primary school and to illiterate educational programs, that is, to read and to write, half of the 18% percent that it spends in education, but it only applied 6,6%.”⁸⁹ But according to IBGE (National Institute of Geography and Statistics), there have been improvements on the school attendance rates:⁹⁰

<i>Percentage of children from 7-14 years-old that are attending school</i>					
1950	1960	1970	1980	1991	1996
36%	45,4%	67,1%	80,4%	86,1%	90,8%

The Ministry of Education launched a campaign in April, 1998, to decrease the mark of 2,7 million children out of school. In 1996, the population between 7 to 14 years-old was around 28,5 millions. The number of enrollments was 33 million. It means that there are children over 14 still attending primary school. It seems that the problem is not solved only by increasing the number of classrooms and by creating incentives for enrollment, but there is also a need to adjust the education to the reality and needs of the children.

The high drop out rates are the result of this problem: the distance between the education and the lives of children, particularly the ones coming from low-income families. The drop out rates are still high. From every group of 1.000 children that enroll in the fundamental school, only 45 finish middle school and 400 don’t pass the first grade

⁸⁹ Chaves, Antonio. “Comentarios ao Estatuto da Crianca e do Adolescente.(Comments to the Child and Adolescent Statute)” Sao Paulo, Brasil, 1994. at 219.

⁹⁰ IBGE, ”PNAD” supra note 2.

of the primary school.

Street children belong to the universe of children that never attended school or that failed and quit. The compulsory and free education have to reach all and special programs should be designed according to the needs of special children such as street children. Until now, most if not all, the majority of the educational programs dedicated to street children have been developed by NGOs. Some NGOs in Rio de Janeiro have been designed according to the special needs and circumstances faced by street children, by NGOs. The educational programs are implemented in the streets, where the children are living or spending most of their time.

Again, the ECA is not reaching street children. The obligation of the State to provide free and compulsory education to all hasn't been fulfilled. Again, street children are children with special needs. In that sense, a simple solution, that is expanding the school system, won't be adequate to street children. Special assistance is needed.

Livelihood/Professional Training

(ECA)

Art. 60 - Any work is forbidden to the adolescents under 14 years-old, except as apprentice.

Art. 63. The technical-professional formation shall obey the following principles:

- I – guarantee to access and compulsory attendance to regular education;*
- II – activity shall be compatible with the development of the adolescent;*
- III – special schedule for the execution of the activities.*

Art. 69 - The adolescent has the right to learn a profession and to protection at work, observing the following aspects, among others:

I - respect to the peculiar condition of a person in development;

II - adequate training to the labor market;

(Convention)

Art. 32. 1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of this article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

(a) provide for a minimum age or minimum ages for admissions to employment;

(b) provide for appropriate regulation of the hours and conditions of employment; and

(c) provide for appropriate penalties or other sanctions to ensure the effective enforcement of this article.

The Federal Constitution followed international standards of 14 years-old, suggested by the ILO – International Labor Organization - as a minimum age for children to work. The Art. 7, XXXIII ⁹¹ of the Brazilian Constitution established the guidelines for the regulation of children's labor activities. Besides the prohibition to work under the age

⁹¹ Art.7. The following are rights of urban and rural workers, among others that aim to improve their social conditions: XXXIII – prohibition of night, dangerous or unhealthy work for minors under eighteen years of age, and of any work except as an apprentice;

of 14, the Constitution recognized the rights (social welfare etc.) of the adolescent worker and guaranteed the access and attendance to school. The ECA enforces those principles and also regulates the application of these provisions. The regulation of the technical-professional formation has particular relevance to the present analysis.

It is particularly critical when underprivileged children turn 18 and have weak family support. The difficulties they face to fit in the adult, professional world are enormous. They are frequently not qualified, uneducated and hence, unprepared to find a job occupation. And, at the same time, they lose the protection of the ECA, and the policies it purports, dedicated to up 18 year-old public. Therefore, the education they seek is more frequently correlated to professional training. At the Rio de Janeiro City level, the social movements presented an amendment to the budget proposing the extension of the City professional training programs to the age of 21 years-old, what was still rejected, remaining limited to the age of 18 and excluding a great number of young adults that need State protection and special care.

But, still, there are professional training programs at State level and also run by NGOs and various associations. Although, the best incentive towards children's welfare doesn't seem to be the early professional training. Some estates in Brazil where school attendance was extremely low, and the drop out rates high, have been implementing a program that gives a salary to every family that enroll the children in school. Professional training is important but not a substitute to the school education that all should have access to.

Special needs - Street Children

(ECA)

Art. 98. The measures for the protection of the children and adolescent are applicable when the rights recognized in this law are threatened or violated:

I – by action or omission of the society or State;

II – by lack, omission or abuse of the parents or responsible;

III – due to the children or adolescent's conduct.

(Convention)

Article 20. 1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, Kafala of Islamic law, adoption, or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 27. 3. States Parties in accordance with national conditions and within their means shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing.

The above mentioned provisions can be applied to street children. Considering the special needs of children, as subjects in a stage of development, also regarding the conditions for the integral development of the children, and the importance of strengthening their family ties, art. 101 of the ECA defines the protective measures to be implemented towards the children that fit in the Art. 98 category, such as street children :

a) to direct the children to parents' or responsible custody, guaranteed their responsibility over the children; b) temporary orientation and assistance to the children; c) enrolment in official school and guaranteed regular attendance; d) medical, psychological or psychiatric treatment; e) State shelter availability; f) foster family placement.

Still, art 39 of the Convention is directed to children with special needs. In the case of art. 39, these children needs are related to psychological recovery and social re-integration.

Art. 39. States Parties shall take all appropriate measures to promote physical and psychological recovery and social re-integration of a child victim of: any kind of inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and re-integration shall take place in an environment which fosters the health, peer-respect and dignity of the child.

The Special Guardianship Councils, as mentioned above, are one of the structures responsible for promoting the protection of children that can be included on the Art. 98 categories, such as street children. Still, all those measures need to be implemented through public policies. In that way, the role played by the Children's Rights Councils

should be taken into consideration. The Children's Rights Councils are another innovation

brought by the ECA. There are Councils at the City, State and National levels. The members of the Councils are supposed to discuss and deliberate over public policies dedicated to children's rights. The members are 50% governmental and 50% non-governmental. The governmental side is appointed by the executive and the non-governmental side are elected by organizations that belong to the society, that is, that are non-governmental. It is an important space open to participation. It is also a channel that needs to be more deeply explored by the non-governmental organizations, in a broad sense. The society, as represented by the elected members, have been facing the challenge of sitting on the council and directly interfering on the policies directed to children, where street children should be the primary target. The challenge does not consist, merely on the work itself. The whole process of negotiation with the government is not easy. There is a lot of political interests involved, beyond the children's interests and welfare. And not always do the governmental members discuss the social policies prior to its implementation. It happens many times that the executive informs the governmental members about its decision and listen to their complaints and denounces. Obviously it is not a lawful conduct. But, still, around 3.000 Councils have been created in the 5.000 cities of Rio de Janeiro State.

According to the above mentioned provisions, the children are entitled to special protection and assistance provided by the State. Therefore, it is opportune to examine Art. 225 and following of the ECA speaks about administrative crimes against the children and

adolescent, by action or omission. Some of the conducts are: a) non identification of the baby just born at the hospitals; b) deprive a child from freedom, without judicial order or on the moment of committing a crime; c) submission by the ones who detain the child custody, the child to shame, constrain, or torture; d) illegal restrain, by the State of a child under custody; e) utilization of children in pornographic scenes in plays, cinema and television movies; f) to sell or provide arms and explosives to children; g) to sell or to provide products that can cause psychic or physical dependence to children.

The State is responsible for the prevention of conducts that can be harmful to children. It has been failing towards street children, not on a single aspect, but in all aspects that consist the human dignity. Street children have special needs. This is undeniable. Although public policies alone won't prevent the overall process of exclusion, it can certainly reduce the impact of it on the children's lives.

V- Conclusion

Enthusiasm is one word that can describe the atmosphere surrounding the advocacy of children's rights in Brazil. The 1990 Statute is a modern, innovative and comprehensive law that opened the horizons for the promotion of the rights of the children. The society organized in the Child and Adolescent's Movement, encompassing associations and NGO's has been playing an important role in the process of enhancing the children's life quality Brazil. The ECA was its first significant achievement. The struggle for the inclusion of art. 227 and 228 in the Constitution, was an effort to improve the legal standards related to the rights of the children. After so many years of martial rule, the social movements went through a phase in which to ensure equal rights for all, was an important goal. It seems though that this target has been achieved. The 1988 Constitution and the ECA are examples of ideal legislation.

The next step is necessarily to achieve the respect for the rule of law. The implementation of the Statute is a key sentence to describe the new phase. The State and the Social Movements are the main actors on the process of incorporation of the new law

by the national culture. And this seems to be their hardest chore.

Enthusiasm is still the word, even facing the difficulties on the implementation of the ECA, because it has been implemented slowly and progressively; because in fact it creates a variety of mechanisms for its own implementation such as the Special Guardianship Councils and the Child and Adolescent's Rights Councils; and because these mechanisms are based on the fundamental partnership between State and society. And, finally, because the law has been partially implemented. There is hope.

But, still, my focus during the present paper wasn't solely to analyze how effective has been the ECA towards the problem of street children, but to tell a story, that is, to describe and analyze the problem as I see it, that is, according to my experience on the legal advocacy for street children's rights. In order to do it, I had to answer basic questions such as what is the problem, who are street children, how does it happen, why they remain in the streets and so on. From all the information and analysis I found about the theme, three topics seemed to have particular relevance.

The economic dimension of the problem is the first one. I intended to demonstrate that the problem of street children is directly caused by a process of social-economic exclusion in Brazil and that it has been aggravated.

The second significant point is the ideology of social control. This mentality has been reinforced in Brazil over the years. Accordingly, social problems are controlled, but not solved, or at least faced in all its dimensions. The social problems are treated as a separated phenomenon, disconnected with the overall political and economic contexts. For

instance, the responsibility for the problem of street children is placed on the children or on their families and the institutional response for it is the placement of the children on State shelters. It is like saying that living in the streets is a choice made by street children.

Finally, the third element is the formation of a new mentality over children's rights,

embodied by the ECA and that has been advocated in Brazil, by the State and by the social

movements, basically since 1985, during the transitional period for the establishment of a democratic regime.

My story mixes these three elements in order to address the problem of street children in Brazil. As demonstrated, there is an ongoing process of marginalization in society. The number of street children has been growing and the adversities they have to face have been aggravated day-by-day. As described, the increasing rate of the killing of slum and street children (in case it is possible to differentiate slum from street children) is

one example. In that context, the law, the ECA is announced as the new paradigm, which should subside the 'new' public policies towards the children. Although not reproducing the ideology of social control, the Statute is still the only 'policy' that has been elaborated on behalf of street children in the country.

A few signs of progress can be perceived, since the ECA was promulgated. Particularly, the Statute is an important instrument against the discrimination against the excluded encompassed by the ideology of social control. But still, the law can't reach the domain of the process of exclusion, which depends on major structural reforms.

I believe that discrimination is on the basis of the country's economic and social

development. Street children are still not treated as subjects of legal rights. They are not even part of the population according to the official data produced by IBGE. Looking through the history, since slaves were emancipated in Brazil, it is hard to tell the difference

from the way street or excluded and marginalized children were treated in 1890 and in 1990. The 'right' of the 'adolescent' to professional training found on the ECA is the essence of the mentality towards street and marginalized children still today. The adolescent is the half adult that comes from a low income family and needs to work. Work

opportunities are, then offered to him or to her. Professional training and not a proper education are available for these children, just like in the old times. Children that live in the

streets in general are not even reached by the 'benefit' of learning a profession. They are invisible to the State eyes and a threat to large portions of the society, that support death squads or that avoid them. Since street children can't be removed from the streets, as explained above, according to the ECA, they are also untouchable. Therefore, they are left on the streets. This is for sure the new State policy towards street children: the policy of negligence.

The street children are isolated in their own universe. I couldn't find, for instance, any deeper and provocative analysis about the role and potential impact of the new legal regime, the ECA, on the lives of street children, of children who need special protection. I couldn't find, as well, more than one book on the Brazilian legal literature mentioning the ratification of the Convention of the Rights of the Child by Brazil. And, still, its analysis of the application of the Convention is shallow and poorly related to excluded

children.

But despite all the mentioned problems, my final words are still hope and enthusiasm because I believe that, gradually, street children are becoming visible and their

universe is not completely unknown any more.

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Glossary

ABI - *Associacao Brasileira de Imprensa* (Brazil's Press Association)

CEB - *Comunidade Eclesial de Base* (Ecclesiastic Community Center)

CEAP - *Centro de Articulacao de Populacoes Marginalizadas* (Center for the Advocacy of marginalized Populations)

CRC - Convention on the Rights of the Child

CPT - *Comissao Pastoral da Terra* (Land Pastoral Commission)

ECA - *Estatuto da Crianca e do Adolescente* (Child's and Adolescent's Statute)

ESG - *Escola Superior de Guerra* (Superior School for War)

FCBIA - *Fundacao Centro Brasileiro para a Infancia e Juventude* (Foundation Brazilian Center dor the Infancy and Adolescence)

FIA - *Fundacao para a Infancia e Adolescencia* (Foundation for the Infancy and Adolescence)

GNP - Gross National product

HRW - Human Rights Watch

IBGE - *Instituto Brasileiro de Geografia e Estatistica* (Brazil's Institute of Geography and Statistics)

ICCPR - International Covenant on civil and Political Rights

ILO - International Labor Organization

FUNABEM - *Fundacao Nacional para o Bem-Estar do Menor* (National Foundation for the Minor Well-Being)

MNMMR - *Movimento Nacional de Meninos e Meninas de Rua* (National Movement for Street Boys and Girls)

NPG - National Performance Gap

OAB - *Ordem dos Advogados do Brasil* (Brazil's bar Association)

PNBEM - *Programa Nacional para o Bem-Estar do Menor* (National program for the Minor Well-Being)

SAM - *Sistema de Assistencia ao menor* (National System for the Assistance of the Minor)

UN - United Nations

UNICEF - United Nations Children's Fund